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NOTES OF RECENT CASES

Kuppuswami Ayyar, J.
2nd December, 1943.

Subban Samban, *In re.*
Crl. R. C. No. 468 of 1943.
(Crl. R. P. No. 425 of 1943).

Penal Code (XLV of 1860), *section* 211—*Gist of offence under—Gangman in Railway reporting to station-master about removal of keys on the line—If can be convicted of offence under section* 211 *of the Penal Code.*

The petitioner was a gangman employed in a railway company. He noticed a person removing two keys on the railway line. He caught hold of the latter who however ran away. The gangman picked the two keys and handed them over to the station-master and gave a report to him only for the purpose of giving information as regards the state of the railway line. On a complaint against the gangman for an offence under section 211 of the Indian Penal Code,

Held: that the station-master was not a person who was entitled to investigate the crime. The information was not given with intent to set the criminal law in motion, but in the discharge of his duties as gangman to give such information about the line to the station-master; accordingly, the gangman cannot be convicted for the offence punishable under section 211 of the Indian Penal Code by reason of his having given the report even though what was stated there was found to be false.

T. K. Rajagopalan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
2nd December, 1943.

Lakshmana Goundan and others, *In re.*
Crl.R.C. No. 804 of 1943.
(Crl.R.P. No. 750 of 1943).

Criminal Procedure Code (V of 1898), *section* 106—*Order under for execution of surety bonds—When can be passed.*

Section 106 of the Criminal Procedure Code is not a section that could be freely used without definite materials before the Judge. For coming to the conclusion that it is necessary to require the accused to execute a bond, there must be materials on which such a conclusion could be based. The circumstance that "there is evidently a faction in the village" is insufficient. When there is nothing to indicate that the accused were members of the faction or that they quarrelled about any matter connected with the faction the making of an order under section 106 of the Criminal Procedure Code is not justifiable.

P. S. Kailasam for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
2nd December, 1943.

Seshappa Chetti, *In re.*
Crl.R.C. No. 632 of 1943.
(Crl.R.C. No. 583 of 1943).

Criminal trial—Appeal—Re-trial with permission to let in additional evidence—Order without going into the question whether on the evidence the conviction was justified or not—Sustainability.

The petitioner was convicted for offences punishable under rule 81 (4) read with rule 81 (2) of the Defence of India Rules in respect of two sales of kerosine and sentenced on each count. On appeal the Sessions Judge (without going into the question and deciding whether on the evidence the conviction was justified or not) felt that it was possible to let in more evidence and therefore set aside the conviction and sentence and ordered a re-trial after giving permission to both sides to let in additional evidence. On revision,

Held: The Sessions Judge was not justified in doing so. It is only if he found that the evidence already let in is not sufficient it would be open to him to direct the prosecution to let in additional evidence or ask the lower Court to record the evidence and send the evidence so recorded to him for consideration.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Mockett and Horwill, JJ.
10th December, 1943.

Chinna Appanna, *In re.*
R.T. No. 221 of 1943.

Criminal Procedure Code (V of 1898), *sections* 164 *and* 533—*Omission of magistrate to attach certificate as required by section* 164 *to confessional statement of accused—Does not invalidate the statement—Omission cured by magistrate's evidence in accordance with section* 533.

The omission of the magistrate to attach the certificate which section 164 of the Criminal Procedure Code requires to be attached to a statement made by an accused of a confessional nature, does not invalidate the statement where the evidence contemplated by section 533 of the Code has been given. No possible injustice could have been brought about by the omission, especially where the evidence shows that everything that the statement requires to be certified as being done was in fact done. The omission is cured by the magistrate's evidence in accordance with section 533 of the Code of Criminal Procedure.

Decision in R. T. No. 157 of 1941, relied on.

N. Kotyswara Rao for Accused.

The Assistant Public Prosecutor (*N. Somasundaram*) on behalf of the Crown.

K.S.

Bell, J.
23rd December, 1943.

Kewalram *v.* Collector of Madras.
Application No. 2670 of 1943.

Defence of India Rules (1939), *rule* 75-*A*—(*Inserted by Notification No.* 1336, *O.R.*|42, *dated April*, 25, 1942)—*Requisitioning property under—If can be made only when absolutely necessary for maintenance of supply and services to the community and for the defence of the country—Housing the Collector of Madras—If a purpose which justifies requisitioning of bungalow under rule 75-A of the Defence of India Rules—Delegation of power to requisition by Government to Collector—Propriety.*

The Provincial Government of Madras being of opinion that a particular bungalow was a suitable place for housing the newly posted Collector of Madras, directed the outgoing Collector to requisition the bungalow under rule 75-A* of the Defence of India Rules. The Collector thereupon issued an order asking the owner of the bungalow to hand over possession. The owner filed an application under section 45 of the Specific Relief Act for directing the Collector of Madras to rescind his order and forbear from requisitioning the bungalow.

It was contended on behalf of the owner that orders requisitioning property under rule 75-A of the Defence of India Rules should be passed only when absolutely necessary for the maintenance of the supply and services to the community and for the defence of the country. It was also contended that powers under rule 75-A could not be delegated except on specific occasions like rioting, fire, etc.

Held, that it was in the public interest that the Collector was suitably housed and the order requisitioning the bungalow for that purpose under rule 75-A of the Defence of India Rules was proper.

Held further, that the delegation by the Government to the Collector of the powers to requisition the bungalow under rule 75-A of the Defence of India Rules was proper.

V. V. Srinivasa Ayyangar, N. T. Shamanna and *N. Srinivasa Aiyangar* for the Applicant.

The Advocate-General (*Sir Alladi Krishnaswami Ayyar*) instructed by the Crown Solicitor for the Collector of Madras.

K.S.

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* The relevant portion of the rule is as follows:—

Rule 75-A, *Requisitioning of Property*: (1) If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance of public order or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, the Government may by order in writing requisition any property movable or immovable and make such further orders as appear to the Government to be necessary or expedient in connection with the requisitioning.

Provided that no property used for the purposes of religious worship and no such property as is referred to in rule 66 or in rule 72 shall be requisitioned under this rule.

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Mockett and Kunhiraman, JJ. Venkata Rao *v.* Padmavalli Tayaramma.
2nd December, 1943. **A. A. O. No. 338 of 1942.**

Arbitration—Award effecting partition—Direction that parties shall discharge the debts due to others according to the accounts in half and half—If a complete award—Award under mistake as to true scope of Hindu Women's Rights to Property Act before Federal Court's decision—Effect on its validity.

In a reference to arbitration by a Hindu and his brother's widow it was stated that under the will of her husband the widow had acquired a right to his entire properties and on the strength of the will and on the strength of the Hindu Women's Rights to Property Act she was entitled to have a partition effected in respect of the entire properties, goods and other assets of the joint family. Accordingly the arbitrators divided the properties and the debts. The award stated that the parties shall discharge the debts due to others according to the accounts in half and half. It was contended that the arbitrators in effect refused to divide the debts on the ground of inconvenience, and also that the widow's claim on the strength of the Hindu Women's Rights to Property Act was based on a mistake of fact (as the Act as held by the Federal Court could not apply to agricultural property) which vitiated the award.

Held: All that the award decided as to the division of the debts was that it was not possible to ascertain the precise figures of the debts which were due to the different people, but when ascertained the parties should discharge them according to the accounts in equal shares. It was a sensible and businesslike method of dealing with the outstanding matter. Where only ministerial acts remain to be done the award cannot be said to be incomplete for that reason. 14 Cal.L.J. 188 referred to.

Held further, that the mistake as to the scope of Act XVIII of 1937 was a mistake as to the general law and cannot be invoked to obtain the intervention of the Court. An objection to the award on that ground must also fail.

K. Krishnaswami Aiyangar for Appellant.

B. V. Ramanarasu and V. Govindarajachari for Respondent.

K.S.

Kuppuswami Ayyar, J. Venkataratnam *v.* Venkataratnam.
7th December, 1943. **A. A. O. No. 150 of 1942.**

Partnership Act (IX of 1932) Section 29—Lease in favour of three partners from Government in respect of lands with salt-pans and brine-pans—Clause prohibiting taking in of new partners—Sub-partnership between one of the partners and another who was to receive share of profits of transfering partner—Not opposed to public policy.

X, Y and Z obtained a lease from the Government in respect of certain lands with all the salt-pans and brine-pans in them. There was a provision *inter alia* that the lessees shall not, except with the written consent of the lessor, assign, sublet or part with the possession of the leased land or any portion thereof and shall not transfer by sale or otherwise the powers granted to them. There was also a proviso that nothing contained therein shall prevent the lessees at any time from taking any partner or partners into the business carried on by them under the lease who may be approved by the commission. X, Y and Z were each entitled under their partnership arrangement to a one third share in it. X took into partnership, A who was given a right to receive a share of the profits of X. In a suit by A for settlement of accounts and recovery of his share of profits,

Held: that the arrangement between X and A was not illegal or opposed to public policy as A was not given any right to interfere with the business of the partnership.

Case-law discussed.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari for Respondent.

K.S.

Mockett and Horwill, JJ. Kotigadu, *In re.*
9th December, 1943. **R. T. No. 220 of 1943.**
Cr. App. No. 770 of 1943.

Evidence Act (I of 1872), section 114, illustration (a)—Accused person last seen with person murdered shortly before the murder and later found in possession of jewels of the deceased—Presumption.

It is a reasonable deduction from the circumstance that the accused person was last seen with the deceased shortly before the murder and was later found in possession of the jewels of the deceased, that he committed the murder.

Narayana v. *King-Emperor*, I.L.R. 56 Mad. 231 followed.

A. Bhujanga Rao for the Accused.

The Assistant Public Prosecutor (*N. Somasundaram*) on behalf of the Crown.

K.S.

N. R. C.

Kunhi Raman, J. Sherfuddin Atta Ahmed *v.* Syed Yousuff.
9th December, 1943. **C. C. C. App. Nos. 52 and 53 of 1942.**

Mahomedan Law—Burial ground—How far res extra commercium.

A cemetery or graveyard is consecrated ground and cannot be sold or partitioned. But there may be a large piece of land in which only a portion may be used as a cemetery or graveyard and in that event it is only the portion that is actually used for that purpose that can be incapable of private ownership. Whether a place is *makbara* (a burial ground) or not depends on the number of persons buried there, or evidence of dedication derived from the testimony of witnesses or reputation.

B. Pocker for Appellant.
M. A. Srinivasan for Respondents.
K.S.

Wadsworth, J. Rangaswami Ayyangar *v.* Subbaraya Goundan.
10th December, 1943. **A. A. A. O. No. 102 of 1943.**

Civil procedure Code (*V of* 1908), *Order* 21, *Rule* 18—*Adjustment of cross decrees in execution—When complete—Application for stay and scaling down under Madras Act* (*IV of* 1938) *Sections* 19 *and* 20—*When competent.*

The adjustment contemplated in order 21, Rule 18 of the Code of Civil Procedure does not come into being automatically the moment there are two applications for execution of cross decrees between the same parties. The satisfaction of the smaller decree and the part-satisfaction of the larger decree are the result of an act of the Court making orders in the two execution applications and until those orders have been passed the two decrees do not become adjusted one against the other. Till such orders are passed stay can be asked for and the decree scaled down under Madras Act (IV of 1938), sections 19 and 20.

A. C. Sampath Aiyangar for Appellant.
K. V. Ramachandra Aiyar and S. Ramachandra Aiyar for Respondent.
K.S.

Mockett and Kunhi Raman, JJ. Krishnamoorthy *v.* Venkata Pitchayya.
10th December, 1943. **A. A. O. Nos. 148 and 292 of 1942.**

Provincial Insolvency Act (*V of* 1920), *section* 44 (2)—*Insolvency of mortgagor—Conditional order of dicharge—Effect—Realisation by sale of hypotheca after such discharge—Right to personal decree for balance.*

On the 28th May 1925 there was a mortgage by the 1st, 2nd and 3rd defendants for Rs. 18,500 and interest. In 1926 the first defendant was adjudicated insolvent. In 1929 the hird defendant was adopted by a stranger. A preliminary mortgage decree was passed on 30th July 1930 and a final decree was passed on 13th November 1930. The hypotheca was sold on 7th October 1931. On the 7th August 1934 there was a personal decree. Meantime, on 29th July 1931, the first defendant was discharged in the following terms:—

"The petitioner will be given discharge subject to the only condition that if he acquires any rights to any properties under O. S. 59 of 1929 they will become vested in the Official Receiver for the benefit of the general body of creditors."

On appeal against the personal decree,

Held: The position with regard to the discharge of an insolvent, whether with or without conditions, is the same. An order of discharge subject to conditions releases the insolvent from all debts provable in insolvency as much as an absolute order of discharge. If an order with a condition attaching is made, he ceases to be an insolvent, but it may be that it is necessary for the Official Receiver or Official Assignee to administer his estate for a time after the order, for the purpose of realising assets. As on the 29th July 1931 the insolvency proceedings ceased by reason of the order of discharge (though conditional) and the hypotheca in this case was sold on 7th October 1931 there is no bar to the passing of a personal decree against the discharged insolvent.

(1942) 1 M.L.J. 11 applied.

V. Govindarajachari and K. Mangachari for Appellant.
K. Kameswara Rao for Respondent.
K.S.

Kuppuswami Ayyar, J. Chinnan *In re.*
16th December, 1943. **Crl. R. C. No. 1036 of 1943.**
(Crl. R. P. No. 975 of 1943).

Criminal trial—Offence under Penal Code, section 366—*Magistrate refusing permission to compound—Duty to question the witnesses himself and not discharge the accused for want of evidence.*

When a magistrate has refused to give permission to compound an offence (in this case one under section 366 of the Penal Code) it is his duty to elicit the necessary facts from the witnesses (compounding complainants who abstain from giving evidence)—by himself questioning them instead of making a farce of the trial and discharging the accused on account of want of evidence.

C. D. Venkataraman for Petitioner.
K.S.

Kuppuswami Ayyar, J.
17th December, 1943.

Thiruvengata Kadungan, *In re.*
Crl. R. C. No. 729 of 1943.
(Case Referred No. 43 of 1943.)

Criminal Procedure Code (V of 1898), *sections* 380 *and* 258 (1)—*Powers of Magistrate to whom a convicted person is sent under section* 380.

When an accused person comes before a Magistrate under section 380 of the Code of Criminal Procedure, since he has already been convicted it is not open to the Magistrate acting under that section to set aside the conviction already recorded by the Referring Magistrate and acquit him purporting to Act under section 258 (1) of the Criminal Procedure Code. All that he could do is to submit the papers to the High Court for revising the order of the Referring Magistrate if he considers that the conviction is improper.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kunhi Raman, J.
17th December, 1943.

Krishna Atiyoti *v*, Province of Madras represented by the Collector of South Kanara.
S. A. No. 1301 of 1942.

Madras Revenue Recovery Act (II of 1864). *section* 36—*Provision requiring place of sale to be specified in the notice—Mandatory—Notification that sale will be held in a named village without mentioning exact place—Is an irregularity which vitiates sale—Inadequacy of price—Inference.*

Where the notification of sale referred to in section 36 of the Madras Revenue Recovery Act did not mention the exact place in the six square miles of the village where the sale was going to be held for arrears of revenue there is co compliance with the requirements of the section. According to the section it is obligatory to mention the precise place, especially so where the village is six square miles in extent and as is characteristic of the district of Malabar and South Kanara the residences of the inhabitants will be scattered all over the village and not crowded together in any particular part of it in the shape of a street or streets.

Direct evidence is not necessary to connect the inadequacy of price realised with a material irregularity where the latter has been proved. The relation of cause and effect between the two may be inferred where such inference is reasonable. I.L.R. 22 Mad. 440 relied on.

P. Govinda Menon for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*), *P. Anandan Nair*, *K. Srinivasa Rao* and *B. Pocker* for respondents.

K.S.

Shahabuddin, J.
17th December, 1943.

Pethachi Chettiar *v.* Subban Chettiar,
A. A. O. No. 170 of 1943.

Civil Procedure Code (V of 1908) *Order* 34, *Rule* 5—*Execution of mortgage decree—Hypotheca divided into three lots and third lot sold and sale confirmed—Subsequent sale of other two lots—Petition to set aside sale of the two lots—Deposit by judgment-debtor of the decree amount then due plus* 5 *per cent—Order under Order* 34 *Rule* 5 *and dismissal of petitions to set aside sale—Effect on the sale.*

In execution of a mortgage decree, the hypotheca was divided into three lots and the third item was sold on the 10th November 1940 and the sale was confirmed on the 31st March 1941. The other two items of the hypotheca were brought to sale on the 5th and 6th February 1941 and P purchased them at the Court auction. On 5th March 1941, two petitions were filed to set aside this sale. While the petitions were pending, the judgment-debtor deposited on the 3rd December 1942 the amount due under the decree on that date plus the 5 per cent that has to be paid to the auction purchaser and prayed for orders under Order 34 Rule 5 of the C. P. Code. To this application P raised an objection that the deposit according to Order 34 Rule 5 should be of the entire amount of the decree and as that amount had not been deposited the petition should not be allowed. The District Judge overruled tbe objection and allowed the application on 28th December 1942. Thereupon the mortgagor's petitions to set aside the sale which were pending were dismissed as they were naturally not pressed. On appeal by P it was contended: (1) that according to section 60 of the Transter of Property Act there can be no partial redemption of the mortgage; (2) that under Order 34 Rule 5 C. P. Code the payment that the judgment-debtor has to make into Court is of all amounts due from him under sub-rule 1 of Rule 4 of Order 34 which refers to the amount mentioned in the decree and (3) that under Order 21 Rule 92 a sale has to be automatically confirmed on a petition to set aside the sale being dismissed and as the petitions to set aside the sale in the present case were dismissed, the sales should have been confirmed. Rejecting these contentions.

Held: (1) What Section 60 of the Transfer of Property Act prohibits is redemption by one of the moatgagors of his share of the mortgaged property. Where, as in the present case there is only one mortgagor and one mortgagee there is no question of one of the mortgagors trying to redeem his share. (2) It cannot be contended that the entire decree

amount including what has been already realised by the earlier sale of one item should be deposited. It is only the balance that is due that has to he deposited. The words "before the confirmation of a sale in Order 34 Rule 5 C.P. Code mean only before the confirmation of the sale in respect of which the deposit is sought to be made and not before confirmation of an earlier sale of one of the items. The mortgagor is entitled to redeem under Rule 5 of Order 34 the two lots sold snbsequently by depositing before that sale is confirmed the amount due under the decree on the date the sale of these items took place with the required 5 per cent payable to the auction purchaser. (3) It cannot be said that the auction purchaser automatically acquires a right to the property on the dismissal of the petitions to set aside the sale irrespective of the circumstances under which it was dismissed. Accordingly the deposit having been made under Order 34, Rule 5 the sale cannot be confirmed.

R. Gopalaswami Aiyangar and *R. Kesava Aiyangar* for Appellant.

P. V. Rajamannar, *K. Subba Rao* and *R. Ekambaram* for Respondent.

Happell, J. Paul *v.* Eswara Ayyar.
3rd January, 1944. **A. A. A. O. No. 179 of 1943.**

Malabar Tenancy Act (XIV of 1930), *section* 33—*Benefits under—Right to—Possession for* 10 *years in the capacity of tenant essential—Possession as usufructuary mortgagee of leaseholder's interest cannot be tacked on to subsequent possession as assignee of the lease.*

A usufructuary mortgagee of leasehold Interest is not a tenant within the meaning of the Malabar Tenancy Act and though he had been in possession as such mortgagee from 1929 to 1937 and after that till the date of suit in 1942 as assignee of the lease, he is not entitled to the benefits of section 33 of the Malabar Tenancy Act of purchasing the right in the kudiyiruppu. The words "continuous occupation of a tenant" in section 33 mean what they say and a person who applies for the benefit conferred by the section must not only be a tenant on the date of the application but must be a tenant throughout the required period of ten years of continuous occupation.

D. A. Krishna Variar for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

Horwill, J. Rukmini Ammal *v.* Official Liquidator
10th January, 1944. of the Sedhinipuram Co-operative Society.
S. A. No. 139 of 1943.

Madras Co-operative Societies Act (*VI of* 1932), *section* 48—*Suit against liquidator of society—Sanction of Registrar essential.*

The appellant, a member of a Co-operative Society, was called upon in the liquidation to pay the sums due to the society by certain relatives of her husband, who were also members of the society, whose debts her husband had promised to pay. She paid Rs. 1000 to the Liquidator out of the Rs. 5000 demanded, but failed to pay the remainder. The appellant filed a suit againt the society in liquidation for a declaration that the order of the liquidator calling upon her to pay the amount as contribution was *ultra vires*, void and illegal.

Held: Whether or not a creditor can sue a person who is not a debtor and who merely undertakes to pay the debts of a debtor and whether or not the society acted without jurisdiction in demanding the amount from the appellant; the sanction of the Registrar was a condition precedent to the filing of the suit, whether the liquidator acted with jurisdiction or not. *Govinda Chettiar v. Uttukottai Co-operative Society.* I.L.R. 1940 Mad. 929 which was contended to be wrong held to be binding and followed.

The Advocate General (*Sir Alladi Krishnaswami Ayyar*), *K. R. Rangaswami Aiyangar*, *V. Rajaram* and *C. R. Pattabhiraman* for Appellant.

P. Govinda Menon for Respondent.

K.S.

Kuppuswamy Ayyar, J. Kasiviswanatha Bhaskaramurthi and others, *In re.*
12th January, 1944. **Cr. R. C. No. 779 of 1943.**
(Cr. R. P. No. 126 of 1943.)

Criminal trial—Revision petition to Sessions Judge against discharge of accused—Remand—Direction to the Magistrate to frame a charge on the evidence already let in—No jurisdiction to give.

Where after an accused person had been discharged the matter was taken to the Sessions Judge in Criminal Revision Petition and he set aside the order of discharge and remanded the case with a direction to the Magistrate to frame a charge on the evidence already let in.

Held, that the Sessions Judge had no jurisdiction to direct a charge to be framed and that it was a matter to be considered by the Sub-Magistrate to whom the case was remanded. It will be open to the Sub-Magistrate after holding an enquiry to dischage the accused again.

B. V. Ramanarasu for the Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Pushpavathi Ammal *v.* Meenakshi Ammal.
3rd January, 1944. **A.A.A.O. No. 272 of 1942.**

Limitation Act (IX of 1908), *Article* 182 (5)—*Execution petition returned on the ground that succession certificate was necessary—Re-presentation with endorsement that the petition may be dismissed as it was made only to save limitation—How far a step-in-aid of execution.*

An execution petition complying with the provisions of Order XXI, rule 11 sub-rule (2), was returned because for a part of the application a succession certificate was necessary. The execution petition was then re-presented with the following endorsement:—*This petition is filed only to save the decree from the bar of limitation. This petition may be numbered and dismissed allowing the petitioner to file later an execution petition with succession certificate.* The petition was dismissed as requested. On a question whether the petition was a step-in-aid which saved limitation,

Held: Whatever might be the position if an applicant for execution stated in the petition itself that he did not wish notice to issue and that the petition was filed merely to save limitation, as the endorsement in the present case that the petition was filed only to save limitation was made only by the pleader after the petition was returned for want of a succession certificate it cannot be said that the petition was not one made in accordance with law and therefore the order passed on the petition will be a final order which will save limitation.

Khalil-ur-Rahman Khan v. *Collector of Etah,* 66 M.L.J. 79 (P.C.), *referred to.*

T. K. Subramania Pillai for Appellant.

S. Panchapagesa Sastri for Respondent.

K.S.

Happell, J. Kuttiasan *v.* Mammad.
10th January, 1944. **S.A. No. 149 of 1943.**

Malabar Law—Tarwad—Assignee of junior member's rights to arrears of maintenance—Decree obtained by—Execution—Members in possession under family arrangement as maintenance holders—If can resist the execution proceedings—Mappilla Marumakattayam Act—Section 10—*Applicability and scope.*

The assignee of the rights of a junior member of a tarwad for arrears of maintenance from the tarwad, filed a suit to recover the arrears and obtained a decree. In execution of the decree he attached the tarwad properties. Certain minor members of the tarwad, who were in possession of tarwad properties as maintenance holders, then filed a suit to have the attachment set aside on the ground that the decree-holder must satisfy the decree from the other tarwad properties and had no right to bring their properties to sale. The contention that the plaintiff's properties were not liable to attachment and sale was founded on decisions that the karnavan cannot set aside an arrangement by which junior members of a tarwad have been put in possession of some of the tarwad lands in lieu of maintenance.

Held: Where a stranger holds a decree which is binding on the family, then, a mode of enjoyment of the property which is enforceable against the karnavan or other members of the family cannot stand against the claims which the decree-holder has against the family as a whole. The decree-holder therefore, is not precluded from proceeding against the appellants' properties merely because they held them under an arrangement in lieu of maintenance. Section 10 of the Mappilla Marumakattayam Act (1939), is not retrospective and has no application to the case and it cannot be contended that under section 10 the decree-holder must exhaust his remedy first against the personal property of the karnavan or the income of the tarwad property before the immovable property of the tarwad can be brought to sale. Even if section 10 is retrospective, it applies only to the execution of decrees obtained by an anandravan for maintenance. It cannot be contended that the assignee of the rights of an anandravan to maintenance stands in the shoes of the anandravan himself, for the purposes of section 10 of the Act.

K. Kuttikrishna Menon for Appellant.

S. Venkatachala Sastri for Respondent.

K.S.

Horwill, J. Subbarayan Chettiar *v.* Ameer Moidin Rowther.
10th January, 1944. **S.A. No. 185 of 1943.**

Malabar Tenancy Act (XIV of 1930), *section* 20 (5)—*Eviction of tenant—Permissible only where the jenmi genuinely requires the land for his own cultivation.*

In a suit by a jenmi for eviction of his kanamdar on the ground that the plaintiff required the land for his own cultivation under section 20 (5) of the Malabar Tenancy Act it was contended that when once the landlord tells the Court that he requires the land for his own cultivation, the Court has no discretion but to decree the suit for eviction and that the only remedy of the kanamdar in case the claim by the landlord is not *bona fide* and the landlord does not in fact take up the land for his own cultivation is to apply under section 20 (1) of the Act to be re-instated. Negativing the contention,

Held: that the Court is bound to dismiss the suit unless the landlord satisfies the Court that he genuinely requires the land for his cultivation. Though it is not easy to decide what

a man's intention with regard to something that is to happen in the future is the Court has nevertheless to decide the question on such material as it has before it.

I.L.R. 1942 Mad. 133, relied on.

D. A. Krishna Variar for Appellant.

P. Govinda Menon for Respondent.

K.S.

Kuppuswami Ayyar, J. Public Prosecutor, Madras *v.* Chinna Sathiraju.
12th January, 1944. **Crl. App. No. 658 of 1943.**

Defence of India Rules, rule 90 (2) (d)—*Acquisition and possession of coin by trader selling his wares—When offence.*

It cannot be said that the getting of coins by a trader in exchange of his wares is not an acquisition contemplated by the statute. A person who gets coins by vending his articles acquires such coins. It is not the acquisition that is made an offence but the acquisition beyond a particular limit, namely, beyond the amount required for daily needs.

Kalappa Mandaya Servai, In re (1943) 2 M.L.J. 280 and *Emperor* v. *Charan Das,* A.I.R. 1943 All. 329, relied on.

The Public Prosecutor (*V. L. Ethiraj*) in person.

V. T. Rangaswami Aiyangar for Respondent.

K.S.

Kuppuswami Ayyar, J. Public Prosecutor, Madras *v.* Dharmamma.
12th January, 1944. **Crl. App. No. 660 of 1943.**

Defence of India Rules, rule 90 (2) (d) *and rule* 90 (3)—*Possession on 7th February,* 1943, *of small coins in excess of what was required—Not an offence as the rule making it an offence was made only in April,* 1943.

It was only in April, 1943, that the Defence of India Rules were amended by making possession of small coins also an offence. Accordingly the possession of small coins in excess of what was required for the business and personal requirements of the person found in possession of the coins on 7th February, 1943, will not be an offence. On that date it was only the acquiring of small coins in excess of one's requirements either for business or personal needs that was punishable.

The Public Prosecutor (*V. L. Ethiraj*) in person.

D. Narasaraju for Respondent.

K.S.

Kuppuswami Ayyar, J. Venkataraju and others, *In re.*
13th January, 1944. **Crl. App. No. 652 of 1943.**

Defence of India Rules—Section 35 (4), *read with rule* 121—*Two bodies of persons actuated by same common object of paralysing British administration—Acts of sabotage done by one group—Members of other group—How far responsible—Penal Code* (*XLV of* 1860), *section* 143—*Offence under.*

Where there were two different bodies of persons actuated by the same common object of paralysing the administration of India by resorting to acts of sabotage, it cannot be accepted as a proposition of law that every one in both those groups will be responsible for the acts done by any one in either group. However a member of the second group joining the first group later after act of sabotage had been completed by the first group will be guilty of being a member of an unlawful assembly, an offence punishable under section 143 of the Indian Penal Code.

K. S. Jayarama Aiyar, P. Satyanarayana Raju and *G. Gopalaswami* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Ellappa and others, *In re.*
20th January, 1944. **Crl. App. No. 747 of 1943.**

Criminal trial—Question of admissibility of confessional statement—One for judge and not jury—Question whether such confession was voluntary—Question for judge only.

The question as to whether confessional statements of an accused person are admissible in evidence or not, is a matter to be decided by the judge and not a matter to be left to the jury for decision. If for deciding the admissibility of a particular piece of evidence it is necessary to find out whether another fact is true or not, that question also will have to be decided by the Judge and it is not a matter that can be left to the jury. For example, the question whether a confession was made voluntarily or not has to be decided by the Judge before he admits the confession in evidence.

The confession will be admissible only if it led to the discovery of an article and the police have no previous information. The question whether the police had previous information or not which could have led to the discovery is a matter to be decided by the Judge for the purpose of deciding the admissibility of the confession.

V. Rajagopalachari for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Ramaswami Reddiar *v.* Kuppalagu Pandithan.
4th January, 1944. **A.A.A.O. No. 87 of 1943.**

Provincial Insolvency Act (V of 1920), section 37—Appointee under—Has power to sell property vested in him without express permission of the Court.

An Official Receiver has power to sell property vested in him by an order of Court passed under section 37 of the Provincial Insolvency Act without the express permission of the Court.

I.L.R. 58 Mad. 908 at 925: 69 M.L.J. 364 (F.B.), explained.

(1943) 1 M.L.J. 127 and (1943) 2 M.L.J. 134, considered.

T. S. Vaidyanatha Aiyar for Appellant.

A. Sundaram Aiyar for Respondent.

K.S.

Horwill, J. Krishna Rao *v.* Venkatarama Rao.
10th January, 1944. **S.A. No. 153 of 1943.**

Hindu Law—Maintenance—Illegitimate sons—Right to maintenance—Limits—Man and woman living together—Presumption that they were married—If can be made.

A Hindu father is bound to maintain his minor son irrespective of whether he has any property or not; but his obligation to maintain an adult son depends upon his possession of joint family property. If he has such property then the illegitimate son is entitled to be maintained out of it both before and after his father's death.

Case-law discussed.

Where a widow has been living with a man, especially in a community where remarriage of widows was not allowed, the presumption that they were validly married cannot be drawn. It is dangerous to apply too closely English presumptions in matrimonial matters to the conditions in India. In the absence of proof of valid marriage, one cannot presume, even if both parties belonged to the same community, that the man living with the widow was legally married to her.

Krishnamurthi and *T. V. Chellapathy Rao* for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

King and Shahab-ud-din, JJ. Public Prosecutor *v.* Velayudha Nadar.
17th January, 1944. **Crl. App. No. 822 of 1943.**

Penal Code (XLV of 1860), section 300, second clause—Person inflicting injury—When can be deemed to have known that injury was likely to cause death.

When the deceased had cut certain trees and was removing them the accused objected to the removal and cut the deceased with an aruval first on the neck and then on the head. The deceased sustained a gaping incised wound in the middle of the back of the neck and a vertical gaping incised wound in the temporal region of the scalp which resulted in a fissured fracture. He, however, was progressing well in the hospital till one day owing to the effusion of blood in the brain he had fits and died. The doctor who held the postmortem deposed that the hemorrhage was due to some exertion or excitement. In his opinion the injuries were likely to cause death; but it was not elicited from him whether the hemorrhage that resulted in the death of the deceased was the usual or probable consequence of the fissured fracture caused by the blow dealt on the head. It was contended by the prosecution that the case came under the second clause to section 300 of the Penal Code and that the accused must be deemed to have known that the injury which he inflicted was likely to cause the death of the deceased.

Held: Such an inference cannot be drawn as it had not been elicited from the doctor that the hemorrhage in the brain could ordinarily be expected from the injuries. It is not unreasonable in the present case to infer that the hemorrhage was an unusual occurrence which could not have been foreseen. Accordingly the conviction of the accused for culpable homicide not amounting to murder is proper.

The Assistant Public Prosecutor (*N. Somasundaram*) for the Appellant.

C. A. Muhammad Ibrahim for the Respondent.

K.S.

N R C

The Chief Justice and Lakshmana Rao, J.
19th January, 1944.

Sriramachandramurthy *v.* Venkataramanayya.
S.A. No. 1463 of 1942.

Civil Procedure Code (*V of* 1908), *section* 11, *Explanation VI—Applicability—Suit by ostensible reversioners of Hindu widow questioning validity of gift by widow—If can be regarded as representing the subsequently adopted son—Subsequent suit by adopted son —Not barred by res judicata.*

On adoption, under the Hindu law, the adopted son dispossesses the widow and becomes the absolute owner of his father's estate. His rights date back to the death of the person to whom he is adopted as a son and he dispossesses the person who holds the property.

(1943) 2 M.L.J. 599 (P.C.), referred to.

Where the ostensible reversioners had filed a suit before the adoption questioning the validity of a gift by the widow they could not be regarded as representing the interest of the adopted son. The reversioners in that suit represented themselves and any one else coming after them and occupying the position of a reversioner. The adopted son does not come after them. He claims directly through his adoptive father. Accordingly a suit by the adopted son questioning the validity of the gift will not be barred by *res judicata* as explanation VI to section 11 of the Civil Procedure Code does not apply to the case.

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

King and Shahabuddin, JJ.
20th January, 1944.

Chikati Guruvulu, *In re.*
Crl. App. No. 726 of 1943.

Penal Code (*XLV of* 1860), *sections* 300 *and* 325—*Intention of accused only to steal jewels from a person—Violence committed to facilitate the theft—Unexpected death of victim from the violence—Offence.*

Where the only intention of the accused who was charged with murder, was to steal the jewels of the deceased and the only act of violence, cutting the nostrils of the victim, which he committed was that necessary in order to facilitate theft and the death of the deceased was entirely unexpected (caused by hemorrhage resulting from the cutting of the nostrils) the conviction of the accused for the offence of murder cannot be sustained. The accused is guilty of causing grievous hurt and must be convicted of an offence under section 325 of the Penal Code.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Kuppuswami Ayyar, J.
26th January, 1944.

Mathayyan, *In re.*
Crl. R. C. No. 33 of 1944.
(Crl. R. P. No. 31 of 1944).

Criminal Procedure Code (*V of* 1898), *section* 164—*Statement recorded under—Right of accused to get copies to facilitate cross-examination of the witness.*

Where a case has been taken on file and is being tried, there ought to be no objection to the granting of a copy of a statement recorded under section 164, Code of Criminal Procedure, as it would be necessary for the cross-examination of the witness. It will be more convenient for the Court itself to grant such copies in advance as it may avoid the necessity for an adjournment on the ground that the cross-examining counsel is not posted with the facts stated in the statement recorded under section 164 of the Code of Criminal Procedure.

Where the preliminary enquiry has commenced and witnesses have been examined the decision in I.L.R. 30 Mad. 466, has no application. All that was stated there is that a person under remand is not entitled to a copy before the commencement of the preliminary enquiry.

K. V. Ramaseshan for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
11th January, 1944.

Krishnaswami Naicker *v.* Govindaswami Naicker.
S.A. No. 175 of 1943.

Limitation Act (*IX of* 1908), *section* 20—*Payment if towards interest—Admissibility of external evidence.*

The reference to writing in section 20, Limitation Act, only requires that the acknowledgment of payment should be in the handwriting of, or the writing should be signed by, the person making the payment that is the whole of the contract need not be in writing. All that has to be in writing is an acknowledgment of the actual payment. Hence external evidence is permissible to show whether a payment has been made towards interest, or towards principal, or was merely an open payment towards a debt consisting of the principal and interest together.

T. S. Vaidyanatha Aiyar for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

V.S.

Horwill, J.
13th January, 1944.

The Madras Provincial Government represented by the Collector of Godavari *v.* Yalamanchili Satyanarayanamurthy.
S.A. No. 367 of 1943.

Proprietary Estates Village Service Act (*II of* 1894), *sections* 11 *and* 13—*Senior proprietor's nomination of a deputy to a minor—Reversal by Revenue Divisional Officer and appointment of a different person—Interference by Civil Court.*

No Civil Court can reverse an administrative order of a Revenue Divisional Officer unless the officer acted *mala fide* or in gross contravention of the rules which he was bound to follow. A Civil Court cannot consider in detail the merits and demerits of the recommendations of the proprietor and of the Divisional Officer. If the Divisional Officer substantially followed the rules his order cannot be interfered with.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

P. Somasundaram and *V. Suryanarayana* for Respondent.

V.S.

Horwill, J.
19th January, 1944.

K. V. Madhavai Kutti Amma *v.* B. S. Thirupurantaka Mudaliar and another.
A.A.A. No. 171 of 1943.

Constructive res judicata—*Execution—Failure of judgment-debtor to raise objection based on Order* 34, *rule* 14, *Civil Procedure Code, prior to sale—Such objection cannot be raised in an application to set aside the sale prior to its confirmation.*

There was an usufructuary mortgage and a lease back for a stipulated rent. Owing to default in payment of the rent a suit on the lease was filed and a decree obtained. In execution of the decree though notices were sent to judgment-debtor for settlement of proclamation she failed to appeal. But later on she appeared and requested for a postponement of the sale waiving fresh proclamation. Time was granted but on the adjourned date she asked for time once again. It was refused and the sale was held. She then applied to set aside the sale prior to its confirmation on the ground that it infringed the provisions of Order 34, rule 14, Civil Procedure Code. On a contention that she was barred from raising it,

Held: The order for sale is a judicial one and when the judgment-debtor appeared in Court at that time she knew that the sale was about to take place. The objection that it ought not to be held because it infringed the provisions of Order 34, rule 14, should have been put forward before the sale was actually held. As she did not do so she must be held to have waived this objection and the principle of constructive *res judicata* would apply and it cannot be raised in the application to set aside the sale prior to its confirmation.

K. Kuttikrishna Menon and *K. P. Raman Menon* for Appellant.

D. A. Krishna Variar for Respondent.

V.S.

Horwill, J.
21st January, 1944.

V. C. Ravi Varma Rajah *v.* The Canara Industrial and Banking Syndicate.
A.A.A.O. No. 170 of 1943.

Civil Procedure Code (*V of* 1908), *section* 51 *proviso—Non-compliance with—Legality of order of arrest.*

A petition to arrest a judgment-debtor was adjourned from time to time and finally to a particular date to enable the judgment-debtor to file his petition in insolvency. On the said adjourned day the judgment-debtor neither appeared nor was any petition in insolvency filed by him. The Court thereupon ordered the arrest of the judgment-debtor.

Held: Though the Court was at perfect liberty to order arrest, the requirements of section 51, Civil Procedure Code, cannot be dispensed with. The Court has to record its reasons for being satisfied that at least one of the four conditions mentioned in the proviso to section 51 is satisfied before it orders arrest. As the Court failed to observe this the order of arrest should be set aside.

A. Achuthan Nambiar for Appellant.

A. Narayana Pai for Respondent.

V.S.

Happell, J.
21st January, 1944.

Thangachami Chettiar *v.* Minor Kanagasabapathi and others.

Hindu Law—Suit on promissory note against father and sons—Decree against father alone, the sons being exonerated—Partition between father and sons thereafter—Properties of both father and sons if liable to attachment in execution.

Where a suit on a promissory note against the father and sons is decreed against the father alone, the sons being exonerated, their properties could be attached in execution of the decree even though a partition had been effected between the father and sons in the interval between the date of the decree and the proceedings in execution.

Doraiswami v. *Nagaswami,* A.I.R. 1929 Mad. 898, followed.

T. L. Venkatarama Ayyar for Appellant.

B. Pocker for Respondent.

V.S.

Bell, J.
28th January, 1944.

Pillarisetti Ranga Rao and others *v.* The Panchayat Board of Tadepallegudem.
C.R.Ps. Nos. 1734 of 1942 and 72 and 73 of 1943.

Madras Local Boards Act (XIV of 1920), *section* 184—*User within the meaning of —Buses halting at bus stand en route their destination—Liability to pay fees.*

If buses enter or remain for however short a period for the purpose of halting or landing and taking up passengers on a bus stand situate en route their destination and maintained in accordance with section 184 of the Madras Local Boards Act, that is user within the meaning of the section and they are liable to pay the prescribed fee.

G. Balaparameswari Rao for Petitioners.

P. Satyanarayana Rao for Respondent.

V.S.

Kuppuswami Ayyar, J.
2nd February, 1944.

Pyarelal Purushotama Das Gupta *v.* Mohammad Abdulla.
Crl.R.C. No. 942 and 955 of 1943.
(Crl.R.P. No. 885 and 898 of 1943).

Madras Prevention of Adulteration Act (1918), *section* 5 (1) (b)—*Sale of tinned powders described as 'Sardar Indian Chicory' and 'Indian Chicory'—Tins found to contain only fried and ground Illupa or Mahua flowers—Offence not made out.*

Tins containing powder made out of Illupai or Mahua flowers only, were labelled and sold as 'Sardar Indian Chicory' and 'Indian Chicory'. On being charged under section 5 (1) (*b*) of the Madras Prevention of Adulteration Act,

Held: Merely because a particular stuff is described by a name part of which, was the name of another root, and when the facts that the contents were made of that root was negatived by the use of the word 'Indian' before the word 'chicory' to indicate that it was something indigenous and not foreign, it could not be said that there was any representation that its contents were made of *cichorium intybus* a root of a plant grown in Europe and the accused are therefore not guilty of an offence under section 5 (1) (*b*) of the Act.

V. Rajagopala Mudaliar for *P. Muthukumaraswami Mudaliar* for Petitioners.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

V.S.

Horwill, J. Nagarathinammal *v.* Visvanathan.
18th January, 1944. **S.A. No. 276 of 1943.**

Mandatory injunction—Interference with light and air of dwelling house—Damages if a proper relief—Creation of alternative sources of light and air.

A new house was built by defendant leaving a space of 2 feet from the plaintiff's southern wall and defendant's northern wall rose to a height of 9 feet and 4¾ feet respectively above the edges of the plaintiff's windows. On a claim for a mandatory injunction for the removal of the wall,

Held: The erection of the new wall had rendered the koodam of the house of the plaintiff materially less comfortable. No sum of money could reasonably compensate the plaintiff for having to live with his family in a house so rendered uncomfortable by the defendant's action. It cannot be suggested that the plaintiff should carry out structural alterations in order to afford additional light of which he has been wrongfully deprived by the defendant and the plaintiff is entitled to the relief claimed.

K. Rajah Aiyar and *V. Seshadri* for Appellant.

V. Ramaswami Aiyar for Respondent.

V.S.

Wadsworth and Patanjali Sastri, JJ. T. S. Rajam and another *v.* Pankajam Ammal and another.
19th January, 1944. **Appeal No. 399 of 1942.**

Succession Act (XXXIX of 1925), *section* 141—*Applicability—Prohibition not confined to cases in which bequest is to an executor as such—Infructuous attempt to take an inventory followed by renunciation of executorship—Not a manifestation of an intention to act as executor.*

A nephew was appointed an executor and a bequest was made to him under the will. He renounced his executorship a few days after being obstructed in his attempt to take an inventory of the articles of the deceased. On the question of the applicability of section 141, Succession Act, to his case,

Held: The words of section 141 are very clear. The section says "bequeathed to a person who is named an executor" not "bequeathed to an executor". It is therefore impossible to contend that the prohibition applies only to cases in which the bequest is to an executor as such. It clearly extends to any bequest whatever be the reason for which it is made, provided the legatee is named an executor. Such an act as an attempt to take an inventory which failed, followed practically as part of the same transaction by renunciation of the executorship cannot be deemed to be a manifestation of an intention to act as an executor within the meaning of the section.

T. R. Venkatarama Sastri and *S. Rajaraman* for Appellants.

N. Rajagopala Ayyangar for Respondents.

V.S.

Horwill, J. Pookkottill Sankaran Vaidiar *v.* Calicut Bank and others.
27th January, 1944. **A.A.A.O. No. 169 of 1943.**

Limitation Act (IX of 1908), *Article* 182 (5)—*Step in aid of execution—Application to the transmitting court after the transmission of the decree—Absence of prayer for simultaneous execution.*

A transmitting court still retains jurisdiction to execute a decree that has been transmitted. The fact that the decree-holder failed to ask such a court expressly to exercise its jurisdiction to execute his decree simultaneously with the transferee court could not make the execution application thereby fail to be a step-in-aid of execution.

M. C. Sridharan for Appellant.

R. Rajeswara Rao for *John and Row* for Respondents.

V.S.

Horwill, J. Ramaswami Aiyar and others *v.* Muthayya Velalar.
28th January, 1944. **A.A.A.O. No. 77 of 1943.**

Civil Procedure Code (V of 1908), *Order* 21, *rule* 16—*Assignment in writing—Decree obtained by managing member—Subsequent partition—Partition list showing decree as falling to another member—Right of latter to apply under Order* 21, *rule* 16.

Where a decree obtained by a managing member fell to the share of another member at a partition in the family and it was so shown in the partition list subsequently drawn up, on an application supported by an affidavit by the latter under Order 21, rule 16,

Held: Either the partition list or the affidavit would be sufficient to operate as an 'assignment in writing' within the meaning of Order 21, rule 16, Civil Procedure Code.

K. V. Ramachandra Aiyar for Appellants.

R. Ramamurthi Aiyar for Respondent.

V.S.

Wadsworth, J. Dwijapada Das *v.* Bellary Mathuramma.
28th January, 1944. **C.R.P. No. 427 of 1942.**

Executing Court—Power to refuse execution—Limits—Application of Madras Act IV of 1938 *to decree passed outside the presidency.*

The power of an executing court to refuse execution is limited to cases in which the decree can be regarded as a nullity. An executing court in the Madras Presidency has no power to apply Madras Act IV of 1938 in such a way as to whittle down a decree passed outside the presidency. Nor is it within the power of the executing court to refuse to execute a decree because the decree was obtained by a trick in getting the promissory note on which it was passed assigned to some one outside the Presidency to evade the operation of Madras Act IV of 1938.

T. V. Bhagavat and *B. V. Ramanarasu* for Petitioner.

K. S. Jayaram for Respondent.

V.S.

Happell, J. V. R. Narasimha Rao *v.* Narasimha Rao and others.
28th January, 1944. **S.A. No. 111 of 1943.**

Trusts Act (II of 1882), section 88—Applicability—Advocate purchasing in execution sale property which his own clients had also attached—Obtaining of pecuniary advantage—Property to be conveyed to the clients.

An advocate purchased in execution sale certain property which his own clients in another suit had also attached. In a suit by those clients for the conveyance to them of the property so bought,

Held: The advocate stood in a fiduciary relation to the plaintiffs which bound him to protect their interests. By himself purchasing the property in execution of another decree, the advocate had entered into dealings under circumstances in which his own interests were or might be adverse to those of his clients, the plaintiffs. As it was found that the defendant had in fact gained for himself a pecuniary advantage, section 88 of the Trusts Act applied and the property must be conveyed to the plaintiffs.

T. V. Muthukrishna Aiyar for Appellant.

S. Ramachandra Aiyar for Respondent.

V.S.

King and Shahab-ud-din, JJ. Palaniappa Chettiar *v.* L.P.L.P. Narayanan Chettiar and another.
28th January, 1943. **App. No. 2 of 1943.**

Civil Procedure Code (V of 1908), section 13—Directly adjudicated upon—Positive discussion of relevant evidence, not necessary.

It cannot be contended that in order for any matter to be 'directly adjudicated upon' there must be a positive discussion of evidence relating to that matter. If any claim is made by any party and subsequently abandoned at the trial of a suit and if the decree in the suit necessarily implies that the claim has not met with acceptance at the hands of the court, then the court must be deemed to have directly adjudicated against it, and its decision is conclusive under the provisions of section 13 of the Civil Procedure Code.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

K. V. Krishnaswami Aiyar and *R. Ramasubbu Aiyar* for Respondent.

V.S.

Happell, J. P. L. Rangiah Chetty *v.* Sha Jasraj Chunilal.
2nd February, 1944. **A.A.O. No. 196 of 1943.**

Contract—Breach—Claim for damages on wrong basis—Relief on right basis can be given.

Where in a suit for damages for breach of contract to purchase yarn, damages are claimed calculated on the difference between the re-sale price and contract price, if it is found there was a breach, the plaintiff could be given a decree for damages calculated on the proper basis that is, the difference between the market price on the date of the breach and the contract rate.

K. V. Ramachandra Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

V.S.

Kuppuswami Ayyar, J. Pogolu Achyutharamayya *v.* Thimmaraju Ramamma.
2nd February, 1944. **A.A.A.O. No. 191 of 1943.**

Execution sale—Validity—Sale held in spite of judgment-debtor's application for stay of sale on the ground of his having filed a petition before the Debt Conciliation Board.

If a petition is filed before the Debt Conciliation Board, even though information thereof is not given to the executing Court, the sale if held is one held without jurisdiction and has to be set aside. If a petition is presented to the executing court on the date of the sale and if the person who presented it also filed an affidavit accompanying the petition for stay, on the ground that he had presented a petition to the Debt Conciliation Board and no counter affidavit is filed, it could not be said that it is not enough evidence to show that the petition must have been filed before the sale was knocked down.

M. Appa Rao for Appellant.

K. Kameswara Rao for Respondent.

V.S.

Mockett, J. Muhamad *v.* Mattara Athan.
21st January, 1944. **C.R.P. No. 78 of 1943.**

Civil Procedure Code (V of 1908), *Order* 47, *rule* 1—*Powers of review—Not to be used to recall decision and substitute another unless the grounds required by Order* 47, *rule* 1 *are present—No inherent power to review unless order was without jurisdiction.*

Unless any of the grounds required by Order 47, rule 1, Civil Procedure Code are present, the Court has no power to review its orders. The Court has no inherent power to review its own decisions unless passed without jurisdiction. It was never intended that a Court should have power just because it changes its mind to recall its decision, set it aside and substitute another decision. 37 M.L.J. 162, relied on. I.L.R. 55 Bom. 368, doubted.

N. R. Sesha Aiyar for Petitioner.

K. Kuttikrishna Menon and *S. Venkatachala Sastri* for Respondent.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ. The Catholic Bank, Ltd., Mangalore *v.* F. P. C. Albuquerque.
25th January, 1944. **A.A.O. No. 173 of 1942.**

Companies Act (VII of 1913), *section* 152—*Scope and effect—Arbitration in which limited liability company is concerned, if confined to provisions of the Arbitration Act.*

On the question whether section 152 of the Companies Act before its amendment by the Arbitration Act, 1940, had the effect of confining arbitration in which a limited liability company was concerned to an arbitration under the Arbitration Act or whether it left the company free to follow any of the courses contemplated by the Civil Procedure Code,

Held: After the enactment of the Indian Companies Act 1913, and before the Arbitration Act, 1940, came into force a company could only enter into an arbitration under the provisions of the Indian Arbitration Act, 1899, and consequently companies were outside the scope of Schedule II of the Code of Civil Procedure.

I.L.R. (1940) 1 Cal. 358, followed.

(1943) 2 M.L.J. 489: 56 L.W. 537, not approved.

I.L.R. 17 Lah. 722, not followed.

B. Sitarama Rao and *S. J. S. Fernandez* for Appellant.

K. Rajah Aiyar, M. L. Nayak, Pais, Lobo and *Alvares* for Respondent.

V.S.

Horwill, J. Moorayya *v.* Suryanarayana.
25th January, 1944. **A.A.A.O. No. 55 of 1943.**

Limitation Act (IX of 1908), *Article* 182 (5)—*Prior application for execution—Dismissal for non-payment of Court-fee—Saves limitation—Application one in accordance with law.*

The dismissal of a prior execution petition for non-payment of Court-fee is a final order. The payment of Court-fee is not a condition precedent to the filing of the execution application. An application can be filed and Court-fee paid at any time prior to execution. Any subsequent default in paying the Court-fee cannot affect the validity of the application itself. The application is therefore one in accordance with law and the order dismissing it is a 'final order' which will save a subsequent application for execution from the bar of limitation.

I.L.R. 30 Mad. 28, applied.

I.L.R. 34 Bom. 189, relied on.

V. Parthasarathi for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Mockett and Bell, JJ. Muhammed Haneef Sahib and others *v.* Board of Trustees Jumma Masjid, Adoni.
3rd February, 1944. **A.A.O. No. 576 of 1942.**

Civil Procedure Code (V of 1908), *section* 92—*Scheme decree—Liberty to apply to the Court for directions—Clause providing for—When valid.*

If in a decree for a scheme framed under section 92, Civil Procedure Code liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled such reservation of liberty in the decree will be *intra vires* if the assistance of the Court can be given without offending section 92; but where liberty is given to apply to the Court for alteration or modification of the scheme such reservation is *ultra vires* as offending section 92.

Authorities considered and I.L.R. 51 Mad. 31 (F.B.), followed.

Basheer Ahmed Sayeed for Appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

K.S.

N R C

Happell, J. Kuppammal *v.* Thangamuthu Pandaram.
3rd February, 1944. **S.A. No. 148 of 1943.**

Husband and wife—Wife suing for maintenance on the ground that she was chaste—Husband proving that she had lived an immoral life—Wife cannot claim maintenance on the ground that husband should also prove that she was living an immoral life when she filed the suit.

A wife after suing for maintenance on the ground that she was a chaste woman and that she had left her husband owing to his misconduct is not entitled, when the husband proved that she had lived an immoral life and that it was not his fault that she had left him, to claim maintenance on the ground that the husband must also prove that she was living an immoral life when she filed the suit. (1939) 2 M.L.J. 294, relied on. 24 I.C. 390 (M.), distinguished.

K. S. Ramamurthi for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Horwill, J. Public Prosecutor *v.* Bavuddin Sahib.
4th February, 1944. **Crl. App. No. 934 of 1943.**

Defence of India Rules (1939), *rule* 81 (4)—*Food Grains Control Order—Rule* 3—*Scope—Whether sale or storage in wholesale quantities prohibited—Storage in wholesale quantities if to be for fulfilling a contract to constitute an offence.*

Criminal Procedure Code (*V of* 1898), *section* 164—*Confessions made otherwise than to a magistrate—Admissibility—Failure to warn that it might be used against confessor—Effect.*

Confessions made otherwise than to a Magistrate under section 164, Criminal Procedure Code are always admissible in evidence, provided that they are made without inducement, threat or promise. A confession recorded by the Sales Tax Officer is admissible even though that officer did not warn the accused that it might be used against him.

It is uncertain whether by the Food Grains Control Order storage in wholesale quantities was not permitted without a license or whether what was prohibited was merely sale in wholesale quantities. The fact that section 2 (*d*) spoke of sale in wholesale quantities rather favours the view that it is only the sale and not storage that is prohibited. In any event, storage for sale is not an 'undertaking'; so that if storage for sale in wholesale quantities is to be an offence, it must be proved that it was stored for the purpose of fulfilling a contract. Accordingly where the accumulation of grain in excess of 20 maunds was accidental, although the accused intended selling the same, it would not be an offence.

The Public Prosecutor (*V. L. Ethiraj*) in person.

A. S. Sivakaminathan for Respondent.

K.S.

Kuppuswami Ayyar, J. Uduman Tharaganar, *In re.*
10th February, 1944. **Crl. R.C. No. 986 of 1943.**
(Crl. R. P. No. 928 of 1943).

Defence of India Rules (1939), *rule* 81 (4)—*Food Grains Control Order—Notification prohibiting storage of rice for sale in wholesale quantities—Contravention—Gist of offence.*

The charge against the accused was that he stored 31½ bags of rice (each bag containing 45 measures weighing two maunds). It was urged that the words "storage for sale, in wholesale quantities were not defined in the Defence of India Rules as they stood on the date of the offence and that rule 3 of the notification prohibited only storage for sale in wholesale quantities and not storage in wholesale quantities for purposes of sale. [The expression "storage for sale in wholesale quantities" has been subsequently defined as meaning storage for purposes of sale, whether the sale is in wholesale quantities or in retail.] On a construction of the expression even apart from the subsequent definition,

Held, that the phrase "in wholesale quantities" govern the words purchase, sale, and storage. Therefore it was also the storage in wholesale quantities for purposes of sale that was prohibited. The accused having stored more than 20 maunds (which is defined as the wholesale quantity) was guilty.

Held, further: It cannot be said that it is only storage in connection with a contract entered into before the storage that was prohibited. An 'undertaking' might be a unilateral act. If a person undertakes to trade and if he stores food grains in wholesale quantities for sale in future under contracts to be entered into in the future, he will still be guilty of the offence punishable under rule 3 of the notification.

Opinion of *Horwill, J.*, in *Public Prosecutor* v. *Bavuddin Sahib,* C.A. No. 934 of 1943, dissented from.

K. E. Rajagopalachari for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Mockett and Bell, JJ. Somasundaram Chettiar *v.* Kannammai Achi.
24th January, 1944. **A.A.O. No. 328 of 1943.**

Civil Procedure Code (V of 1908), Order XL—Scope—Application alleging wilful default or gross negligence and conversion against receiver—Reference to commissioner for enquiry improper—Appropriate procedure.

Order XL of the Civil Procedure Code, contemplates an enquiry in cases of ordinary questions of accounts and also cases of wilful default or gross negligence; but it is not designed to cover what in substance is a case of conversion against the receiver. In such a case the matter should be referred to a separate suit. 5 C.W.N. 223; I.L.R. 53 Cal. 881 and 40 C.W.N. 479, distinguished.

Where an application for accounts levels serious charges of wilful default and gross negligence against a receiver it is wrong to refer the enquiry into the charges to a commissioner, *Manicka Mudaliar* v. *Andalammal* (1940) 1 M.L.J. 356: I.L.R. (1940) Mad. 636, relied on.

If the charge was merely one of default the matter could be enquired into and decided by the Court. But where the charge is virtually one of conversion the matter should be referred to a suit.

B. Sitarama Rao and *T. S. Vaidyanatha Aiyar* for Appellants.

C. Padmanabha Aiyangar, A. Sundaram Aiyar, M. S. Krishnamurthi Sastri and *T. K. Sundararaman* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ. Hanumantha Rao *v.* Ramachandrayya.
31st January, 1944. **Appeals Nos. 79 and 80 of 1942.**

Evidence Act (I of 1872), sections 112 and 118 to 120—Issue as to paternity—Evidence of either parent as to non-access at the time when conception could have taken place—Admissibility—Section 112—Child born during coverture—Presumption—Evidence of non-access—"Access"—Meaning.

There is nothing in the Evidence Act, which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that a child born during the continuance of the marriage to the wife is illegitimate.

A husband or wife of any party to a suit is a competent witness under section 120 of the Evidence Act and to find out what evidence a competent witness can give, regard must be had to the general rules of relevancy and admissibility as laid down in the Evidence Act subject only to such special exceptions as the Indian statute law embodies.

1924 A.C. 687, considered; I.L.R. 62 Cal. 108, not approved; 25 M.L.J. 594: I.L.R. 38. Mad. 466 (F.B.), relied on.

The law governing proof of legitimacy of a child born during the continuance of a marriage is laid down in section 112 of the Evidence Act. The fact that the child was born during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. The word "access" in section 112 of the Evidence Act, does not mean actual sexual intercourse and the only way in which the presumption under that section can be displaced is by proof that the parties to the marriage had no opportunity for intercourse with each other at any time when the child could have been begotten: I.L.R. 12 Rang. 243 (P.C.): (1943) 2 M.L.J. 108: 56 L.W. 383 and 54 L.W. 411, relied on 61 M.L.J. 878 and 66 M.L.J. 279, held to be incorrect.

Ch. Raghava Rao for Appellant in Appeal No. 79 of 1942 and Respondent in Appeal No. 80 of 1942.

S. Panchapakesa Sastri and *G. C. Venkatasubba Rao* for Appellant in Appeal No. 80 of 1942 and Respondent in Appeal No. 79 of 1942.

V. Subramaniam for Respondent in both.

K.S.

Happell, J. Chingleput Co-operative Urban Bank, Ltd. *v.* Thirupurambal Ammal.
9th February, 1944. **S.A. No. 250 of 1943.**

Mortgage—Award on by Registrar of Co-operative Societies in favour of a co-operative society—Award not executed and allowed to become barred by limitation—Subsequent suit even against persons not impleaded in the award—Proceedings barred.

A Co-operative Bank having already obtained an award from the Registrar of co-operative societies against the mortgagor for the amount due under the mortgage cannot file a second suit on the mortgage. Once an award has been obtained, the cause of action becomes merged in the award and the only remedy is to enforce it by execution. But a mortgagee who has not executed his decree (or award as in the present case which can be treated on the same footing) and allowed it to become barred cannot bring a second suit even against a person not impleaded in the first. His cause of action is the same. It is founded on the mortgage; and the mortgage having been extinguished, no fresh suit will lie.

N R C

V. Ramaswami Aiyar for Appellant.
P. V. Rajamannar and *K. Subba Rao* for Respondent.
K.S.

Horwill, J. Paramasivan Nambudripad *v.* Subramania Iyer.
9th February, 1944. S.A. Nos. 8 to 10 and 131 of 1943.

Malabar Tenancy Act (XIV of 1930), *section* 51 (2)—*Scope—Not applicable for estimating damages for breach of contract.*

The actual words of section 51 (2) of the Malabar Tenancy Act, only lay down a commutation rate where rent, michavaram or renewal fee has to be fixed. The sub-section could not have been intended to apply to estimating damages for breach of contract. Where under a contract rent is to be paid in kind section 52, requires it to be delivered at the landlord's granary. If the tenant does not do so, then the landlord would be entitled to the value in money of the produce at the time of the breach. Section 51 of the Malabar Tenancy Act cannot be applied for assessing the amount of damages.

S. Venkatachala Sastri for Appellant.
T. V. Muthukrishna Aiyar and *K. P. Ramakrishna Aiyar* for Respondent.
K.S.

Kuppuswami Ayyar, J. Abdul Kalick Sahib *v.* Abdul Kayyum Sahib.
9th February, 1944. A.A.A.O. No. 19 of 1943.

Practice—Attachment before judgment—Judgment-debtor having no title to the property—Subsequent acquisition of interest by debtor—Effect.

It cannot be said that because there had been already an attachment of certain property as the property of some of the defendants also, when in fact they had absolutely no interest, the subsequent acquisition of interest by them would entitle the decree-holder to avail himself of the earlier attachment. If the subsequent application is made more than twelve years after the passing of the decree, limitation would not be saved as against the defendants who had no interest in the property at the time the earlier application for attachment was made.

I.L.R. 18 Cal. 164, 176 and 177, distinguished.

K. V. Ramachandra Aiyar for Appellant.
S. V. Venugopalachari for Respondent.
K.S.

Horwill, J. Mahalakshmamma *v.* Viraraghavulu.
10th February, 1944. S.A. No. 363 of 1943.

Civil Procedure Code (V of 1908), *section* 73—*If restricted to persons who are eo* nominee *judgment-debtors.*

The appellant held a personal decree against certain judgment-debtors, the decree being one on a promissory note executed by the judgment-debtors in renewal of a debt of the last male owner whose properties they had inherited. The respondent had obtained a decree against the assets of the last male holder in the hands of the same judgment-debtors. The respondent applied for rateable distribution of the assets realised in execution of the appellant's decree.

Held: The decree of the respondent is certainly against the judgment-debtors' own property, though its application is limited to the estate received by the judgment-debtors from the original debtor. As both parties were proceeding against that very estate there is no reason why section 73 should not be applied. The situation would have been different if the appellant sought to execute his decree against property of the judgment-debtors which had not come to them from the deceased debtor.

69 M.L.J. 711, referred to.

V. Subramaniam for Appellant.
M. S. Ramachandra Rao for Respondent.
K.S.

Kuppuswami Ayyar, J. Narayana Rao *v.* Venkataseshayya Chetty.
16th February, 1944. A.A.A.O. No. 120 of 1943.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 90—*Judgment-debtor waiving fresh proclamation and praying that sale might be held a month later with Rs.* 2,500 *as upset price—Sale subsequently held—Objection as to wrong description in sale proclamation and low valuation—If can be raised to have the sale set aside.*

Where there was an incorrect description in the sale proclamation, namely, that there was one house only while there were three houses and further the property was undervalued but the judgment-debtor appeared and waived fresh proclamation and only prayed that the sale might be held a month later with Rs. 2,500 as upset price and the sale was accordingly held it will not be open to the judgment-debtor to object to the sale on the ground that there was an incorrect description and that the upset price was low. He is estopped and not entitled to have the sale set aside on those grounds, *Arunachalam v. Arunachalam*, I.L.R. 12 Mad. 19 (P.C.), followed.

K. S. Jayaram for Appellant.
K. Srinivasa Rao for Respondent.
K.S.

Wadsworth and Patanjali Sastri, JJ. Sarojinidevi *v.* Krishna Anjaneya Subramaniyam.
4th February, 1944. **Appeal Nos. 311 and 380 of 1942.**

Hindu Women's Rights to Property Act (XVIII of 1937)*—Applicability—Mango grove —If "agricultural land" to which Act has no application—Government of India Act,* 1935, *Schedule VII —Lists II and III—Entries—"Agriculture"—Meaning—Widow—Right to maintenance—Quantum.*

For the purposes of the relevant entries in Lists II and III of Schedule VII of the Constitution Act the expression "agricultural lands" must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. It follows that a mango grove forming part of an estate is "agricultural land" in respect of which the Hindu Women's Rights to Property Act, 1937, does not operate to regulate succession.

[Decisions under various enactments as to the meaning of "agricultural land," discussed].

A widow is entitled to maintenance notwithstanding her right under the Act to a share in the non-agricultural part of the family estate which however will be taken into account in determining the amount payable as maintenance. (1943) 1 M.L.J. 235, approved.

Ch. Raghava Rao for Appellant in Appeal No. 311 of 1942 and for Respondent in Appeal No. 380 of 1942.

K. Bhimasankaram for Respondents in Appeal No. 311 of 1942 and for Appellant in Appeal No. 380 of 1942.

K.S.

Happell, J. Zamindar of Poravipalayam *v.* Ramaswami Goundar.
4th February, 1944. **A.A.O. No. 323 of 1943.**

Civil Procedure Code (V of 1908)*, section* 9*—Right to celebrate the annual worship of a deity in a temple—If a civil right in respect of which suit for injunction is maintainable in a Civil Court.*

Certain villagers sued for a permanent injunction restraining the defendants (the zamindar and a villager of an adjoining village) from celebrating the annual worship of the deity Makali Amman of the village during that year or at any future time. The defendants' case was that it was the Zamindar who had the right to perform the ceremonies in the temple and that the plaintiffs had not the right which they claimed. On a question as to the cognizability of the dispute by the Civil Court,

Held: Though it may not always be easy to draw the line between what is merely a part of the ritual of the worship and what is a right to conduct the worship itself, in the present case there is a straightforward claim to have the right to perform the annual worship of the Goddess which is enforceable by a civil suit.

3 L.W. 512 and 31 M.L.J. 758, relied on.

(1938) 1 M.L.J. 174; 41 L.W. 752; 120 I.C. 874; (1939) 1 M.L.J. 199; (1939) 1 M.L.J. 124; 14 M.L.J. 171; I.L.R. 28 Mad. 23 and 9 M.L J. 355, referred to and discussed.

S. S. Ramachandra Aiyar for Appellant.

T. V. Ramanatha Aiyar for Respondent.

K.S.

Horwill, J. Noor Shah Maracair *v.* Magadoon Naina Maracair.
8th February, 1944. **S.A. No. 357 of 1943.**

Limitation Act (IX of 1908)*, Article* 89*—Applicability—Trust empowering four of the members of a family just divided to manage some of the properties set apart for winding up a business and paying debts—Claim by members for balance after payment of debts—Limitation.*

A family of Mahomedans divided the greater part of their properties, but left some items undivided in order that they might make arrangements for winding up a business and paying their debts. They executed a deed, described as a trust deed, empowering four of the members of the family to manage the properties thus left undivided and to do what was necessary for the discharge of the debts. The deed further provided that the four members should furnish accounts and finally distribute the proceeds according to the shares of the various members under the Mahomedan law. In a suit by certain members for an account and for their share in the produce of the properties thus left joint.

Held: (*i*) The suit, having been filed more than three years after the agency was terminated, was barred under Article 89 of the Limitation Act; (*ii*) The deed though described as a trust deed could not be a trust deed as there was no conveyance of the properties to the persons who were to manage them. It is immaterial whether the persons who are to manage the properties are strangers or members of the family.

51 I.C. 253, relied on; 1937 M.W.N. 368, distinguished.

N R C

(*iii*) It cannot be said that the agents were constructive trustees. The possession of the manager must be referred to their agency under the deed and not to their rights as co-owners.

(*iv*) A clause in a deed of agency requiring the agent to give to the principal what was due to him after he had done all else that was required of him under the deed would not prevent time from running. The position would not be changed if there were two or more principals. Limitation would begin to run from the date when the agent had completed all his duties—realising assets and paying the debts—except the return of the money to his principals.

K. Rajah Aiyar and *K. Sreenivasan* for Appellants.
Basheer Ahmed Sayeed for Respondent.
K.S.

Horwill, J. Venkateswarlu *v.* Hymavatamma.
8th February, 1944. **S.A. No. 124 of 1943.**

Promissory note—Endorsement to another person antedating it with a view to avoid the application of Madras Act (IV of 1938)*—If a forgery and a nullity.*

An endorsement on the back of a promissory note purporting to endorse the note over to the plaintiff was antedated and written merely to avoid the application of Madras Act (IV of 1938). In a suit on the note by the endorsee,

Held, that the antedating of the endorsement made it a forgery especially as the endorser made the false document with the dishonest intention of making the debtor under the note liable for an amount exceeding that which Madras Act, IV of 1938, permitted. The effect of a forged document in India is the same as in England and it has therefore no legal effect whatsoever. The forged endorsement conveyed no title on which the endorsee could sue. The principle of section 13, clause 2 of the English Bills of Exchange Act under which antedating and postdating of cheques was permissible is not applicable. The dishonest antedating will always constitute forgery.

A.I.R. 1926 Mad. 1154, considered.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.
P. Satyanarayana Rao for Respondent.
K.S.

Horwill, J. Vellachi *v.* Gopalan Nair,
9th February, 1944. **S.A. No. 160 of 1943.**

*Malabar Law—Marumakkathayam family—*Tavazhi*—Partition—Mother and some of her children—If can remain joint after disruption of the* tavazhi.

By dividing themselves off, some children cannot compel their mother to divide herself from those children who prefer to remain joint with her. This is so under the Hindu law and there is no reason why it should not be so in a Marumakkathayam family. 55 M.L.J. 208: 51 Mad. 574 and 40 L.W. 857, distinguished.

K. Kuttikrishna Menon and *A. Gopalakrishnan* for Appellants.
P. Govinda Menon for Respondents.
K.S.

Mockett, J. Suryaprakasa Rao *v.* Examiner of Local Fund Accounts, Madras.
10th February, 1944. **A.A.O. No. 399 of 1943.**

Local Boards—Order for surcharge—Necessity for notice where president is sought to be surcharged on further grounds than those in the surcharge certificate of the Examiner of Local Fund accounts.

Where the president of a Village Panchayat Board is sought to be surcharged in respect of money fraudulently converted to his own use by the Panchayat Bill Collector, it is a penal procedure and what might be described as the charge, is the surcharge certificate of the Examiner of Local Fund Accounts, wherein he sets out the ground on which the surcharge is based. Where however an item of charge was not the subject of any allegation by the Examiner of Local Fund Accounts the Court cannot pass an order for surcharge without proper notice to the person sought to be surcharged. When there is ample opportunity for the Government to give notice to the person sought to be surcharged on any further grounds on which they claimed to make him liable at the hearing of the suit he should not be made liable on a totally new charge.

V. Suryanarayana for Appellant.
The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.
K.S.

Happell, J. Sivasubramania Mudaliar *v.* Shanmuga Rajeswara Sethupathi.
15th February, 1944. **S.A. No. 282 of 1943.**

Madras Estates Land Act (I of 1908)*, sections* 3 (11) *and* 77*—Suit for rent of lands on which houses had been built—Necessity for proof that land was held for agricultural purposes while the Act was in force.*

Where the land in question had been cultivable since the Madras Estates Land Act came into force but the tenant had merely chosen to build houses on it rather than to use it for agricultural purposes, he would be liable to pay rent in respect of it. The definition of "rent" in section 3 (11) of the Estates Land Act does not require that the ryot in possession should actually use the land for the purpose of agriculture. The liability to pay exists so long as his right to use it for agricultural purposes subsists and what he is bound to pay is rent. 25 M.L.J. 50, relied on.

If it is not shown at least that lands on which houses have been built had been ryoti lands at some period while the Estates Land Act had been in force the inference that the occupant had the right to use the lands for an agricultural purpose and is liable to pay "rent" for them within the definition of section 3 (11) of the Estates Land Act cannot be drawn.

(1938) 2 M.L.J. 829, referred to.

M. V. Ganapathi for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

Horwill, J. — Audinarayana *v.* Ayyanna.

17th February, 1944. — **S.A. No. 671 of 1943.**

Hindu Law—Joint family—Contract for sale of family property by manager or father—Enforceability against the minor members.

Where, as many as four adult members take part in a contract for sale of joint family property and all the minor members are represented by their fathers, it would seem *prima facie* that the contract was entered into with the individual members of the family and not with the manager.

An agreement to sell being enforceable against the manager when the purpose of the sale is binding on the family, an agreement to sell by a father could be enforced against the father if the sale were for the discharge of an antecedent debt.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

V. Govindarajachari for Respondent.

K.S.

Horwill, J. — Pattalamma (village Goddess of Vedapalli) represented by Swamigadu *v.* Manikyam and others.

21st February, 1944. — **S.A. No. 381 of 1943.**

Customary right—Practice of taking procession of the village goddess in years of pestilence through field of a private owner—Essentials for acquiring the right.

A practice should be attributed to a right only if the exercise of that practice is inconsistent with permission being granted by the owner of the land over which the practice was to carry in procession the village goddess in years of pestilence. Unless the customary right is reasonable it cannot be recognised. The practice of taking the procession through a field owned by the plaintiff in times of adversity should be attributed to the consent of the previous owner of the land, in the absence of evidence that the procession was ever conducted through the land against the wishes of the owner. Further, as such processions could be taken by the villagers in any direction they pleased it would be unreasonable to claim a right to take it through the plaintiff's land which was since being used as a garden. I.L.R. 17 All. 87, applied.

P. Satyanarayana Rao for Appellants.

C. Rama Rao for Respondents.

K.S.

Kunhi Raman, J. — Brahmayya *v.* Nagireddi.

25th February, 1944. — **C.R.P. No. 838 of 1943.**

Contract Act (IX of 1872), *section* 25 (3)—*Document in writing agreeing to pay a debt barred by limitation—Ignorance of executant that the debt was barred—Effect.*

If a person executed a document in writing agreeing to pay debt (which is barred by limitation), in ignorance of the fact that the debt had become barred by limitation, the provisions of section 25 (3) cannot apply and the promise under the document will be one not supported by consideration and therefore cannot be enforced.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Petitioner.

K. Kotayya for Respondent.

K.S.

Mockett and Bell, JJ. — Mohammad Abdulla *v.* Corporation of Madras.

28th February, 1944. — **Crl.R.C. No. 89 of 1944.** **(Crl.R.P. No. 86 of 1944).**

Madras Prevention of Adulteration Act (III of 1918), *section* 12—*Action under—Production of goods seized as adulterated before Magistrate with necessary certificate—Evidence connecting goods and certificate essential.*

The Food Inspector of the Madras Corporation took action under section 12 of the Madras Prevention of Adulteration Act against a trader and seized from his shop a number of goods, and samples were taken to the Public Analyst. The Magistrate dealt with the case merely on the certificate and the goods. On revision,

Held: Though under section 12 of the Act no procedure is laid down and it would appear that all that is necessary is that the goods which were the subject of the proceedings should be produced before the Magistrate with the necessary certificate, there must be evidence to connect the goods and the certificate, and it is wrong to act merely on the certificate and the goods produced.

V. Rajagopala Mudaliar for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

B. Lakkappa Rai for Respondent.

K.S.

Kuppuswami Ayyar, J. Rajagopal Chettiar *v.* Arunachala Mudaliar.
28th February, 1944. **A.A.A.O. No. 242 of 1942.**

Limitation Act (*IX of* 1908), *Article* 182 (5)—*Execution petition returned for filing additional documents but not re-presented within time—Application to excuse delay in re-presentation—Notice to other side not essential—Excusing delay—Effect.*

If a petition should be filed for excusing the delay (in re-presentation of an execution petition returned for filing some additional documents) even though the time given for re-presentation had expired, if the delay is excused the petition will become one which has a legal existence the order on which will be a "final order" saving limitation. For such a petition to excuse the delay in re-presentation or to extend time, there is no mandatory provision directing the issue of a notice to the respondent before the delay is excused and the order extending time or excusing delay does not become one made without jurisdiction merely because of the absence of such notice. 51 M.L.J. 219=50 Mad. 67, distinguished.

N. Srinivasa Aiyangar for Appellant.

S. Thiyagaraja Aiyar and *T. N. Sundaresa Aiyar* for Respondent.

K.S.

Kuppuswami Ayyar, J. Subramania Ayyar, Petitioner.
1st March, 1944. **Crl.R.C. No. 210 of 1944.**
(Crl.R.P. No. 201 of 1944).

Criminal Trial—Destruction of records by fire pending a rehearing of an appeal as ordered on revision—Authentic copies of all the records not available—Only course is to direct a de novo *trial.*

Two accused were charged with having committed criminal breach of trust in respect of some jewels. They were convicted by the first Court but acquitted by the Joint Magistrate on appeal. On revision to the High Court the order of acquittal was reversed and the Joint Magistrate was directed to rehear the appeal. But the Joint Magistrate was not able to rehear the appeal because the records in the case had been burnt, when his Court was set fire to in August, 1942, with the result that he found himself unable to go on with the appeal in the absence of the necessary papers. Certified copies of the prosecution evidence were available but those pertaining to the defence evidence were not available. In the circumstances *held,* that the Joint Magistrate had no other course except to order a *de novo* trial. If all the certified copies were available *de novo* trial could not have been ordered.

S. Venkatesa Aiyangar for Petitioner.

K.S.

Kuppuswami Ayyar, J. Ganapathi and others—Accused.
2nd March, 1944. **Crl.R.C. No. 168 of 1944.**
(Crl.R.P. No. 159 of 1944).

Defence of India Rules—Prohibition of fishing in the vicinity of Madras harbour—Contravention—Offence—Confiscation of catamarans, and nets—Not permissible.

There is no provision in the Defence of India Rules authorising the Courts on a conviction (for fishing in the vicinity of the Madras harbour in contravention of the notification under the Defence of India rules) to order the confiscation of the catamarans, nets, etc., used by the accused.

G. Natarajan for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Happell, J. Jothimani *v.* Agnesis Chellathayammal.
14*th February,* 1944. S.A. No. 274 of 1943.

Transfer of Property Act (IV of 1882), *section* 60—*Applicability—Mortgagee purchasing portion of hypotheca from absolute purchaser from one of the mortgagors—Right to insist on redemption by other mortgagors by payment of whole amount due—limits.*

The first defendant, one of the mortgagors, sold under two sale deeds his share to a stranger undertaking to pay off the mortgage debt in respect of the share from other properties. The stranger subsequently sold the properties which he had purchased to the mortgagee himself reciting that "the entire balance due under the mortgage deed mentioned in the particulars of the receipt of money has been discharged in full through this deed". In a suit by the mortgagee to enforce the mortgage,

Held, that where the mortgagee purchases a portion of the properties from one of the mortgagors for its full value absolutely and free from the mortgage, the mortgagee is entitled to insist that the whole of the mortgage money remaining due to him should be recovered from the other properties. The mere fact that the sale was not a direct sale by one of the mortgagors to the mortgagee does not make any difference. The governing fact is that on the date of the suit the mortgagee, as far as the first defendant's share was concerned, had not only acquired the equity of redemption but had purchased it absolutely free of the mortgage. (1940) 2 M.L.J. 1003, referred to.

R. Ramamurthi for Appellant.

N. S. Sundaram for Respondent.

K.S.

Mockett, J. Puttengattil Mamu *v.* The Nedungadi Bank, Ltd.
15*th February,* 1944. C.R.P. No. 894 of 1943.

Madras Debt Conciliation Act (XI of 1936), *section* 25—*Procedure under—Scope—Stay of suit or proceedings—Can be ordered only once and it is immaterial as to who applies for stay.*

Section 25 of the Debt Conciliation Act says no more than that "when an application has been made to a board under section 4, any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the board has dismissed the application". Although it is a convenient procedure no doubt, strictly there is no reason why either the judgment-debtor or the decree-holder should apply for stay. It is their duty to inform the Court of the application, and when the Court is informed, it is the duty of the Court to make a stay order.

Where on the first occasion the stay application was made by the decree-holder and after dismissal of the application for conciliation, another application for conciliation was made and the judgment-debtor made a fresh application for stay under section 25 of the Debt Conciliation Act, the second stay application cannot be granted. It is totally immaterial on whose initiative the stay order was made by the Court as in both cases it amounts to nothing more than that somebody brings to the notice of the Court the fact of the debt conciliation proceedings and if the Court is satisfied that the information is accurate, the Court then stays the execution proceedings.

(1939) 2 M.L.J. 727; (1940) 2 M.L.J. 923; (1941) 2 M.L.J. 123, relied on.

(1940) 2 M.L.J. 283, distinguished.

K. P. Raman Menon for Petitioner.

V. C. Viraraghavan for Respondent.

K.S.

Chandrasekhara Ayyar, J. Venkataramayya *v.* Atchayya.
17*th February,* 1944. S.A. No. 524 of 1943.

Inam—Service inam land—When can be converted into jeroyti land by agreement with landholder—Service inam lands—Partition—Validity.

What is really service inam cannot become jeroyti land by agreement with the landholder, unless it is proved that the right of resumption is with the landholder, which is possible only if the grant was a post-settlement and not a pre-settlement one.

A partition of service inam lands is not illegal or prohibited by law. All that was decided in 43 L.W. 718, was that the income from such properties could not be deemed to be joint family property available for family necessities as maintenance. On the other hand the case recognises that when the office holder dies leaving sons more than one and the service

has to be performed by all of them by turns or in any convenient manner, the emoluments could also be enjoyed by them in such manner as they may deem fit.

P. Somasundaram for Appellant.

K. Mangachary for Respondent.

K.S.

Chandrasekhara Ayyar, J.
18th February, 1944.

Kandaswamy Padayachi and others *v.* The Province of Madras (represented by the Collector of Salem) and others.
S.A. No. 427 of 1943.

Forest Act (V of 1882), section 5—Scope and construction—Resort to Civil Courts—Prohibition—Limits—Decision of Forest Settlement Officer—How far res judicata.

The provision in section 5 of the Forest Act that Civil Courts shall not be resorted to for the establishment of any right in or over any land between the dates of the publication of the notification under section 4 and of the notification under section 16, does not mean that after the notification under section 16, Civil Courts shall have jurisdiction irrespective of the question whether the rights set up are not rights which should have been advanced, for consideration by the special tribunals constituted under the Forest Act, for their determination. Where special tribunals are constituted to redress particular injuries, it is they that must be resorted to and not the Civil Courts. 11 Mad. 309 at page 313 (F.B.), considered.

Where it was decided by the Forest Settlement Officer that a particular area was sufficient for pasturage and the claim for more was not justified and the order was confirmed by the District Collector on appeal, the Settlement Officer is a Court. By the provision for an appeal against their decisions, what is *res judicata* may become *res subjudicata* and the appellate tribunal may have to hear the case once again. But Civil Courts have no appellate jurisdiction over those special tribunals and so far as they are concerned, what has been decided by those tribunals must be taken to have become *res judicata*. 12 Mad. 105; 20 Mad. 279 and 17 M.L.J. 557, relied on.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for 1st Respondent.

K.S.

[F.B.]
The Chief Justice, Mockett and Lakshmana Rao, JJ.
21st February, 1944.

Murthiraju *v.* Subbaraju.
C.R.P. No. 719 of 1943.

Civil Procedure Code (V of 1908), section 115—Scope—Decision on question as to inadequacy of court-fee—When open to revision by High Court.

A revision petition lies when a Court Subordinate to the High Court holds that the plaintiff has inadequately stamped his plaint, but a petition for revision does not lie when a defendant has unsuccessfully challenged the adequacy of the stamp affixed by the plaintiff unless a further question of jurisdiction is involved.

55 M.L.J. 345; I.L.R. 51 Mad. 664 and 56 M.L.J. 394, affirmed,

P. Suryanarayana for *P. Somasundaram* for Petitioner.

P. Satyanarayana Raju for Respondent.

K.S.

Mockett and Bell, JJ.
2nd March, 1944.

Ramayya *v.* Lakshmayya.
A.A.O. Nos. 334 to 336 of 1943.

Civil Procedure Code (V of 1908), Order 43, rule 1 (d)—Order directing deposit of costs of other side and that in default petition will stand dismissed—Final and appealable.

An order directing that the applicants "shall deposit costs as a condition precedent to restoration of suit within a fixed time and that in default the petitions will stand dismissed with costs" is final and appealable.

T. S. Rama Rao for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Horwill, J. Audinarayana *v.* Rattamma.
8th February, 1944. **C.R.P. No. 2185 of 1941.**

Court Fees Act (*VII of* 1870), *section* 7 (iv) (a)—*Applicability—Plaintiff dispossessed from property—Suit alleging that a gift deed executed by the plaintiff was sham and nominal for screening properties from creditors—Prayer for mere declaration that plaintiff was still the owner of the property and possession—Sufficiency—Cancellation of gift deed—Not necessary.*

The plaintiff executed a sham and nominal gift deed for the purpose of screening his property from his creditors. He was subsequently dispossessed of this property and he therefore sought a declaration that he was still the owner of the property, despite the execution of the gift deed and for possession.

Held, that as the gift deed was intended to be inoperative and was not intended to be anything more than a scrap of paper it had no legal effect and did not stand in the way of the plaintiff's getting a declaration of his title and it was not necessary to pray for the cancellation of the gift deed. It was sufficient to pay court-fee as for a declaration and consequential relief.

Case-law reviewed.

V. S. Narasimhachar for Petitioner.

P. Somasundaram and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

K.S.

Horwill, J. Merwadi Sumermal Jaintraj Firm *v.* Bandade Thukkappa.
15th February, 1944. **S.A. No. 158 of 1943.**

Specific Relief Act (*I of* 1877), *section* 27—*Applicability—Prior agreement—Transferee without notice paying portion of consideration in cash and the remainder by adjustment of an outstanding debt—If protected.*

Section 27 of the Specific Relief Act protects a transferee who has "paid his money". If he has not paid the whole of the consideration it cannot be said that he has paid his money; for he has paid only a part of it. Where, however, a portion of the consideration was in adjustment of an outstanding debt and the remainder was paid in cash, the transferee thereby paid to the transferor all that had to be paid under the contract and can therefore literally be said to have paid his money and will be protected by the provisions of section 27 of the Specific Relief Act.

V. S. Narasimhachar for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

Horwill, J. Subbarami Reddi *v.* Chenchuraghava Reddi.
17th February, 1944. **S.A. No. 348 of 1943.**

Hindu Law—Joint family—Minor coparceners—Partition inter se—*If can be brought about by their paternal grandfather—Guardians—If can bring about partition in the interests of minors without recourse to Court.*

A Hindu grandfather has the same powers to effect a division amongst his minor grandchildren as a father has with regard to his minor children. Observations in 32 M.L.J. 439 (though obiter), followed.

Where the guardians of minors find it impracticable to manage the affairs of the minors without partitioning the property, they can bring about a partition, in the interests of the minors, without recourse to the Court. A.I.R. 1930 Mad. 486 and I.L.R. 39 Mad. 159, considered.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. Umamaheswaram for Respondents.

K.S.

Mockett and Bell, JJ. Indo-Commercial Bank, Ltd. *v.* Narayanan Nambudri.
17th February, 1944. **A.A.O. No. 45 of 1943.**

Madras Nambudri Act (*XXI of* 1933), *section* 23—*Husband and wife separating from* illom—*Status of—Cannot claim partition* inter se—*Share of either—Cannot be proceeded against in execution of a decree.*

Under the Madras Nambudri Act a married man who is a member of an *illom* is entitled to claim a partition but must do so on behalf of himself and his wife. They receive their respective shares jointly and apart from the circumstance of a change of religion arising, neither of them may claim partition from the other. That places an insuperable obstacle in the way of a decree-holder seeking to execute his decree against a married member of an *illom* who has partitioned from the rest of the family. The reason is that by the terms of the statute the only remedy available to a decree-holder (to

attach and sell the right, title and interest of a co-sharer and having purchased it to compel partition against the co-sharer) is expressly denied.

(1940) 2 M.L.J. 747, considered and explained away.

S. Panchapagesa Sastri and *C. D. Venkataramanan* for Appellant.

P. Govinda Menon for Respondent.

K.S.

Horwill, J. Madura, etc., Devasthanams *v.* Solai Alagu Kudumban and others.
17th February, 1944. **S.A. Nos. 46 to 49 and 73 and 74 of 1943.**

Civil Procedure Code (V of 1908), *section* 100—*Suit by landholder of inam village against minor inamdars for damages for unauthorised taking of water from landholder's tank for second crop—Not a suit for "rent"—Claim for reimbursement of cess paid and for poruppu—Suit is of small cause nature—Second appeal—Does not lie.*

Minor inamdars who under their grant were entitled to water for only a single crop were taking water for a second crop from the tank belonging to the landholder of the inam village. A suit by the landholder against the minor inamdars for damages for the use of the water cannot be said to be a suit for "rent". The minor inamdars are not "ryots" and what is payable by them will not be rent.

(1940) 1 M.L.J. 160=I.L.R. (1940) Mad. 745 and (1938) 1 M.L.J. 256=I.L.R. (1938) Mad. 381 (F.B.), distinguished.

To a minor inamdar holding directly under the grantor and not by way of an under-tenure from the landholder the first proviso to section 88 of the Local Boards Act does not apply and such minor inamdars are not intermediate landlords and a claim for reimbursement against them for cess already paid by the landholder is not one for "rent".

(1937) 1 M.L.J. 91=I.L.R. (1937) Mad. 498 (F.B.), referred to.

The claim for *poruppu* in the suit is of a small cause nature; so also the claim for interest on the amounts claimed.

The claims in the suit being of a small cause nature no second appeal lies.

K. Rajah Aiyar and *T. A. Ramaswami Reddi* for Appellants.

A. Balasubramania Aiyar v. *Meenakshisundaram* and *K. V. Srinivasa Aiyar* for Respondents in S.A. Nos. 46, 48 and 49 of 1943.

Respondents in S.A. Nos. 47, 73 and 74, not represented.

K.S.

Happell, J. Kante Ramanna *v.* Chowdari Mahammad Abdul Subhan Saheb.
25th February, 1944. **S.A. No. 515 of 1943.**

Civil Procedure Code (V of 1908), *Order* 21, *rule* 2—*Suit for possession by purchaser in execution—If can be resisted by a purchaser from the judgment-debtor on the ground that the decree had been satisfied by an uncertified adjustment out of Court and that in bringing the property to sale the decree-holder had acted fraudulently.*

In cases where the decree has been satisfied out of Court but certification of the payment or adjustment has not been made to the Court and, notwithstanding the fact that the decree has been satisfied, the decree-holder proceeds with execution of the decree,

(*i*) The judgment-debtor cannot successfully resist execution of the decree by pleading that it has been satisfied because of the bar of clause (3) of Order 21; rule 2.

(*ii*) The judgment-debtor cannot maintain a suit for an injunction restraining the decree-holder from executing the decree or a suit to set aside the sale because these suits relate to execution within the meaning of section 47 of the Civil Procedure Code.

(*iii*) The judgment-debtors can maintain a suit to recover the money paid as damages for breach of contract, because such a suit although no doubt remotely connected with the execution, discharge or satisfaction of the decree, does not directly affect the execution proceedings or anything done in pursuance of them.

The judgment-debtor (or a person claiming under him as his purchaser) cannot resist a suit for possession by the purchaser in execution of the property on the ground that the decree had been satisfied by an uncertified adjustment out of Court and that by bringing the property to sale the decree-holder had acted fraudulently. I.L.R. 57 Cal. 403 (F.B.), applied. I.L.R. 21 Mad. 356, I.L.R. 36 Mad. 357 and I.L.R, 29 Mad. 312, considered.

C. Rama Rao for Appellant.

K. V. Rangachari for Respondent.

K.S.

Horwill, J. Puttappaji *v.* Nallappa.
25th February, 1944. **A.A.A.O. No. 172 of 1941.**

Practice—Execution—Orders in—How far res judicata—*Implications from order to execute—Plea of limitation not raised in earlier petition—Effect—Limitation Act, section 3—Not applicable where there is a bar of* res judicata.

An order passed in one execution petition will operate as *res judicata* if a similar point arises for decision in a later execution petition and a decision made at one stage of exe-

cution operates as *res judicata* at a later stage. If an order to execute is passed in an execution petition, then by implication the Court has decided, (1) that the petitioner has a right to execute, (2) that the judgment-debtor is liable to satisfy the decree, (3) that the decree is executable, and (4) that it is not barred by limitation. At no subsequent stage is it open to the judgment-debtor to dispute the correctness of these four implied decisions.

A.I.R. 1937 All. 446, not approved; (1941) 1 M.L.J. 270, followed.

A decision on an application right or wrong is binding and it cannot be said that section 3 of the Limitation Act makes it obligatory upon the Court to dismiss an application made after the period of limitation even though limitation has not been set up as a defence. There cannot be any subsequent order inconsistent with the earlier one.

M. Krishna Bharathi and *S. Ramachandra Aiyar* for Appellant.

K. K. Gangadhara Aiyar for Respondent.

K.S.

Mockett, J. Puthiyetath Nayar *v.* Ammanikani Krishnan Nayar.
25th February, 1944. **A.A.O. No. 675 of 1943.**

Malabar Tenancy Act (XIV of 1930), *section* 33—*"Family"—Includes a man's son in a* marumakkatayam tarwad *and has the ordinary meaning in English—Technical meaning under Malabar Law—Not applicable.*

Whatever the technical meaning in Malabar of *tarwad* and *tavazhi* there is nowhere attached by statute any special meaning to the English word "family" in section 33 of the Malabar Tenancy Act. It must therefore be given its ordinary meaning in English which comprehends a man's sons. It cannot be said that for the purposes of section 33 of the Act the son is not a member of the father's family or *vice versa*. The word 'family' in that section must be shorn of all technical application.

The question as to the meaning of the word "family" in the other sections of the Act left open.

Accordingly where one of the male members of a *tarwad* obtained from his brothers an assignment of their interest in a leasehold and assigned such interest to his son *X* who subsequently obtained an assignment of the remaining interest of his paternal aunt in the leasehold, *X* is entitled to apply under section 33 of the Malabar Tenancy Act for purchasing the rights in the kudiyiruppu from his landlord. It cannot be said that the kudiyiruppu had not been in the continuous occupation of *X* or "members of his family" for the requisite period of ten years according to section 33 of the Act. The expression "members of his family" applies also to the son of a man governed by the Marumakkatayam Law of Inheritance.

S. Venkatachala Sastri for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

The Chief Justice and Sahab-ud-din, J. Muniswami Chetty and Co. *v.* Muniswami Chetty and Co.
1st March, 1944. **O.S.App. No. 37 of 1943.**

Sale of Goods Act (III of 1930), *section* 35—*Contract for sale of five bales of muslin —Stipulation that delivery should be given "ex-godown as and when goods come"—Arrival of goods on 2nd December,* 1942—*Delivery of only two bales—Demand for delivery of balance of three bales on 9th December,* 1942—*Non-compliance—Breach of contract—Damages—Relevant date for assessment—Contract Act (IX of* 1872), *section* 73—*Applicability.*

A contract was made for the sale of five bales of printed muslin and it provided *inter alia* that delivery should be given "ex-godown, as and when the goods come". A consignment of twelve bales arrived in Madras on the 2nd December, 1942, when the vendors delivered to the purchasers two of the twelve bales and after delivering two bales each to two other purchasers retained six bales for sale by themselves. The market was rising then. The purchasers having ascertained that the vendors had received twelve bales demanded delivery of three bales to make up the five bales which they had contracted for. This demand was made on the 9th December, 1942, when the prices had risen very much more. On a question as to the date to be taken into consideration for the assessment of the damages,

Held: The stipulation for delivery "as and when the goods arrived" amounted to a contract for delivery on the date of their arrival in Madras, namely, 2nd December, 1942, which must be deemed to be the date of breach. There is nothing in the Sale of Goods Act inconsistent with section 73 of the Contract Act, and it must be taken to apply. If the contract had contained no stipulation with regard to delivery the seller would not have been bound to deliver them until the buyer applied for delivery. As the contract however contained an express provision as to delivery the contract was broken on the 2nd December, 1942, when the goods arrived in Madras and the damages must be based on the market

price ruling on that date and not as on the date of failure to comply with the demand for delivery.

K. Rajah Aiyar and *A. Ramachandran* for Appellants.

C. Srinivasachari and *C. Devarajan* for Respondents.

K.S.

King and Shahab-ud-din, JJ. Srinivasan *v.* Ramaswamy Ayyar.
3rd March, 1944. **Appeal No. 206 of 1942.**

Hindu Law—Joint family—Sale of land which could not conveniently be cultivated, calculated to confer a benefit on the estate—Binding on minors—Intending purchaser not bound to see to the application of the purchase money—Nature of inquiry to be made.

The sale of land (belonging to a joint Hindu family) which could not conveniently be cultivated (because for instance of their situation in scattered lots) and the investment of the purchase money in lands which could be so conveniently cultivated can be upheld as one calculated to confer a "benefit on the estate" though such a sale may not be necessary in the sense of being absolutely indispensable. The intending purchaser is not bound to see to the application of the purchase money.

I.L.R. (1937) Mad. 906 and I.L.R. 59 Bom. 525, applied.

Nature and scope of inquiry by purchaser in such cases indicated.

T. R. Venkatarama Sastriar and *N. Sivaramakrishna Aiyar* for Appellants.

B. Sitarama Rao, K. S. Desikan and *K. Raman* for Respondents.

K.S.

Kuppuswami Ayyar, J. Narayanaswami Naidu, *In re.*
9th March, 1944. **Cr.R.C. No. 48 of 1944.**
(Cr.R.P. No. 46 of 1944).

Defence of India Rules (1939) *rule* 81 (2) (i) (*iii*)—*Charge of transporting rice in a lorry from Madras to Chittoor—Confiscation of rice—Order for on* 18*th October,* 1943—*Not valid as amendment enabling confiscation was made only on* 15*th November,* 1943.

It was only on 15th November, 1943, that there was any amendment of the Defence of India Rules which enabled the Court "trying the offence together with the coverings thereof in respect of which the Court is satisfied that the offence has been committed to be forfeited to His Majesty." Consequently an order on the 18th October, 1943, (which was prior to the coming into force of the amendment) after discharging the accused confiscating the bags of rice which were alleged to have been transported in a lorry from Madras to Chittoor is unsustainable and must be set aside. The order cannot be justified under section 517 of the Criminal Procedure Code, as no reasons for so confiscating were given by the Magistrate.

V. T. Rangaswami Ayyangar and *K. Kalyanasundaram* for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Happell, J. Tholisamma *v.* Pedda Fakir Reddi.
10*th March,* 1944. **C.R.P. No. 1401 of 1943.**

Civil Procedure Code (*V of* 1908), *Order* 47, *rule* 1—*Dismissal of suit without costs, without assigning any reason therefor—Is analogous to an "error apparent on the face of the record" justifying a review.*

The dismissal of a suit without costs, without assigning any reason therefor is analogous to an "error apparent on the face of the record" to justify a review amending the decree so to make costs follow the event.

M. S. Ramachandra Rao for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

Kuppuswami Ayyar, J. Srinivasa Rao, *In re.*
14*th March,* 1944. **Crl.R.C. No. 24 of 1944.**
(Crl.R.P. No. 23 of 1944).

Madras Prevention of Adulteration Act (*III of* 1918), *section* 5 (2)—*Food found in the possession of a person who is in the habit of manufacturing or storing like articles for sale—Presumption that they were for sale—Not irrebuttable.*

The presumption under section 5 (2) of the Madras Prevention of Adulteration Act that any food (in the present case ghee) found in the possession of a person who is in the habit of manufacturing or storing like articles for sale has been manufactured or stored by such person for sale, is not an irrebuttable presumption.

V. Rajagopala Mudaliar for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Mockett and Bell, JJ. Muhammad Sulaiman Sahib *v.*
29th February, 1944. Municipal Council, Trichinopoly.
A.A.A.O. No. 216 of 1943.

Civil Procedure Code (V of 1908), *sections* 2 (2) *and* 96—*Order excusing delay in presenting execution petition—Not a "decree" and no appeal lies against it.*

Where all that was ordered by the Court was that the delay in presenting the execution petition should be excused, the order cannot be said to come within the definition of a "decree" under section 2 (2) read with section 96 of the Civil Procedure Code. An appeal against such an order is not maintainable. Any objection to the order excusing the delay could be taken in the appeal against the final order in the execution petition.

T. V. Ramanatha Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

King and Horwill, JJ. Anantanarayana Iyer *v.* Ramu Pattar.
1st March, 1944. **Appeal No. 334 of 1942.**

Mortgage—Subrogation—Person discharging subsequent mortgages on the understanding that if pre-existing simple mortgage should be discharged mortgagor would execute a usufructuary mortgage in his favour for the amounts—Claim for specific performance unenforceable because of delay in discharging simple mortgage—Right to subrogation subsists.

Where a person discharges two subsequent mortgages in favour of third parties on an express promise by the mortgagors to execute a usufructuary mortgage in his favour if the original simple mortgage should be discharged and in any case to pay interest on the amount advanced until the discharge should be effected, that person can rightly claim to be subrogated in equity to the position of the two mortgagees whose debts he discharged although it was impossible to grant any decree for specific performance of the agreement because of the simple mortgage remaining undischarged. *Oonamalai Ammal* v. *Narasimha Rao,* A.I.R. 1938 Mad. 161 and *Dinobundu Shaw Chowdary* v. *Jagamnaya Dasi,* I.L.R. 29 Cal. 154 (P.C.), relied on. The right to subrogation is not in any case conditioned by a right to obtain specific performance of the agreement). View of *Sundara Ayyar, J.,* in *Narayana Kutti Goundan* v. *Peechiammal,* 22 M.L.J. 364: I.L.R. 36 Mad. 426, held to be *obiter dicta* and not followed. *Adari Sanyasi* v. *Nookalamma,* I.L.R. 54 Mad. 708, distinguished.

C. S. Swaminathan for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

K.S.

Chandrasekhara Ayyar, J. Venkanna *v.* Brahmudu.
10th March, 1944. **S.A. No. 888 of 1943.**

Limitation Act (IX of 1908), *Article* 11—*Applicability—Settlement of sale proclamation—Mortgagee of property denying decree-holder's allegation that his mortgage was collusive and praying for sale subject to his mortgage—Settlement of sale proclamation notifying the mortgage with the remark that it was alleged to be collusive—Suit on mortgage after one year of settlement of proclamation—Barred under Article* 11 *of the Limitation Act—Civil Procedure Code (V of* 1908), *Order* 21, *rule* 63—*Applicability.*

In filing certain sale papers in connection with the execution of a decree for the payment of money, the decree-holder referred to the existence of two mortgages on the property but stated that they were collusive transactions. On this, notice was ordered to the mortgagees. One of them appearing in answer to the notice filed a petition stating that the mortgage in his favour was a true one and that it was fully supported by consideration and asking the Court for directions that the sale of the property should be held subject to his mortgage. The Court ultimately directed in settling the draft proclamation that the particular mortgage and another should be notified at the time of the sale with the remark that the decree-holder alleged that they were collusive. In a suit on the mortgage filed more than one year after that date,

Held: The provisions of Order 21, rule 63 of the Civil Procedure Code will be attracted even in cases of applications filed by mortgagees in the course of the settlement of sale proclamation. 31 M.L.J. 247; 37 M.L.J. 159 and 38 M.L.J. 397, relied on.

When the mortgagee prayed for an order that the property should be sold subject to his mortgage the Court did not grant him that relief, though it did not decide the question of the genuineness of the mortgage. Accordingly the suit on the mortgage was barred under Article 11 of the Limitation Act.

(1941) 2 M.L.J. 956: I.L.R. (1942) Mad. 336 (F.B.), applied.

K. Bhimasankaram for Appellant.

C. Rama Rao for Respondent.

K.S.

N R C

King and Horwill, JJ. Chidambaram Chettiar *v.* Nagappa Chettiar.
13*th March*, 1944. **Appeal No. 364 of 1942.**

Court-Fees Act, (*VII of* 1870), *section* 7 (*IV*) (*A*)—*Suit by* quandom *minors for a declaration that a compromise decree in a prior suit filed by their father and themselves was not binding on them—Proper valuation.*

A suit was brought by two brothers in a Nattukottai Chetti family for a declaration that a compromise decree passed in 1929 was not binding on them. That decree was passed in a suit of 1924 in which the two plaintiffs and their father sought to set aside an agreement by the father with the other members of the family as one having been extorted from him in circumstances which would make it not legally binding upon him. In the suit of 1924 the plaintiffs who were then minors were at first represented by their mother as next friend but they and their father jointly filed a single plaint and were represented by a single legal adviser. While that suit was pending the father entered into a compromise with the defendants. On the 6th November, 1929, the Court ordered the substitution of the father as next friend of the minors after which the father and the defendants filed a memorandum of compromise which was certified by the Court to be for the benefit of the minors. That memorandum formed the basis of the decree. On attaining majority the plaintiffs sued to have it declared that the compromise and the decree were not binding on them and paid a court-fee of Rs. 500 under Article XVII-A of Schedule II of the Court-Fees Act. On the question of court-fee payable,

Held: Though they may not ask for cancellation of the prior decree such a prayer is necessarily implied and therefore the suit must be valued *ad valorem.*

V. Ramaswami Aiyar for Appellants.

K. Bashyam Aiyangar, T. R. Srinivasan, R. Rangaswami Aiyangar and *R. Desikan* for Respondents.

K.S.

Happell, J. Subramanyam *v.* Rami Reddi.
16*th March*, 1944. **C.R.P. No. 1486 of 1943.**

Sale of land—Provision in sale deed that vendee shall "hereinafter" enjoy all "hakkulu badyathala"—*Construction—Liability for property tax—Ambiguity in deed—Vendee entitled to construe words in a manner advantageous to himself.*

When the word *"badyathala"* is used in conjunction with *"hakkulu"* the meaning ordinarily attached to the word is "rights and interests" although when used alone or in opposition to the word *"hakku"* the more ordinary meaning may be liability. From a provision in a sale-deed that vendee shall thereafter have all *hakkulu badyathala* it cannot be said that the liability as for instance for municipal property tax is contracted to be paid by the vendee.

In any case the words are not unambiguous and if the vendor fails to express himself with reasonable clearness, if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself and make the vendor liable for the property tax due.

Seaton v. *Mapp*. (1846) 2 Coll. 556: 63 E.R. 859 at 862, relied on.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Petitioner.

J. V. Srinivasa Rao for Respondent.

K.S.

Happell, J. The Public Prosecutor, Madras *v.* Kuppuswamy.
23*rd March*, 1944. **Crl.App. No. 79 of 1944.**

Madras Motor Vehicles Taxation Act (*III of* 1931), *section* 7—*Hirer of motor vehicle passing it to military authorities under an agreement—Liability to prosecution for non-payment of tax, as person having possession of vehicle.*

The accused was a contractor for the third Madras Regiment at Bellary which had hired a motor vehicle from him from 13th December, 1942, to 24th December, 1942. The accused had hired the vehicle from its owner before passing it to the military authorities. In a prosecution for non-payment of tax due on the vehicle for that quarter,

Held: Although the accused was neither in "possession nor in control" while the vehicle was in the custody of the military authorities, he was certainly in possession for some period during the quarter in respect of which the tax had to be paid before he handed over the vehicle to the military. Technically, therefore, he was a person having possession within the meaning of section 7 of the Madras Motor Vehicles Taxation Act, and was punishable by fine as the tax had not been paid in respect of the motor vehicle during the quarter.

The Public Prosecutor (*V. L. Ethiraj*) in person.

A. T. Sundaravaradhan for Respondent.

K.S.

Chandrasekhara Ayyar, J. Kothandaramaswami Temple at Adembar *v.*
7th March, 1944. Veezhinatha Ayyar.
S. A. No. 862 of 1943.

Madras Hindu Religious Endowments Act (II of 1927), section 73—Suit by trustees of temple for recovery of grains or their value deliverable to them under the terms of a will—Sanction of the Board not essential—Distinction between section 73 of the Madras Hindu Religious Endowments Act and section 92, Civil Procedure Code (V of 1908).

Section 73 (3) of the Madras Hindu Religious Endowments Act contemplates only a suit which has the direct effect of interference in the administration or management and cannot apply to a suit by the trustees of a temple for the recovery of paddy or their value deliverable to them under the terms of a will. Though in one sense the payment of money for one trust can be said to be done only in the course of administration or management such a dim and distant connection with the administration or management of a trust is not what is contemplated by section 73 (3) of the Act.

Distinction between section 92 of the Civil Procedure Code and section 73 (2) of the Madras Hindu Religious Endowments Act considered.

T. V. Ramanatha Aiyar and *S. Sitarama Aiyar* for Appellants.

S. Tyagaraja Aiyar for Respondents.

K.S.

(F.B.).

The Chief Justice, Wadsworth, and Patanjali Sastri, JJ. Srinivasa Ayyar *v.* Swaminatha Odayar.
14th March, 1944. **Appeal No. 162 of 1942.**

Madras Agriculturists Relief Act (IV of 1938), section 3(ii), Proviso C—Scope and effect—Assessment to property tax—If should be in the name of debtor in the municipal assessment register so as to exclude him from the definition of an 'agriculturist'.

A case comes within Proviso C to section 3 (*ii*) of Madras Act IV of 1938 when the following factors are present:—

(*i*) There is property which has an annual rental value of not less than Rs. 600;

(*ii*) the property has been assessed to house or property tax for two years immediately preceding the 1st October, 1937; and

(*iii*) the municipality demands or recovers the tax from the owner or otherwise treats him as liable to pay the tax.

The decision in *Swaminatha Odayar* v. *Srinivasa Ayyar,* (1939) 2 M.L.J. 495, is erroneous in that, it holds that a person cannot be assessed within the meaning of the proviso unless the assessment is made in his name in the municipal assessment register.

The insertion in the assessment register of the name of the true owner of the property is not the deciding factor.

M. S. Venkatarama Ayyar for Appellant.

R. Gopalaswami Ayyangar for Respondent.

K.S.

Happell, J. Panchayat Board, Badagara *v.* Narayana Kurup.
15th March, 1944. **C.R.P. No. 1492 of 1943.**

Madras Local Boards Act (XIV of 1920), section 21 (2)—Suit by the president in the name of the Panchayat Board without resolution of the Board sanctioning the filing—Subsequent ratification by Board—Cannot cure the defect.

Where a suit to recover arrears of tax is filed by the president of a Panchayat Board without a resolution of the Board sanctioning such filing the subsequent ratification by the Board cannot cure the defect.

Notified Area Committee, Okara v. *Kidar Nath,* I.L.R. 17 Lah. 35, followed.

The President of the Board has no more right to institute a suit to recover arrears of tax than any other third party and the Court is not competent to try the suit and must dismiss the same.

The defect cannot be cured under the provisions of O. 1, R. 10 of the Code of Civil Procedure as until a resolution by the Panchayat Board sanctioning the institution of the suit, neither the Board nor any one else had a right of suit. I.L.R. 30 Mad. 419, distinguished.

C. K. Viswanatha Ayyar for Petitioner.

T. K. Rajagopalan for Respondent.

K.S.

Horwill, J. Sathiraju *v.* Madhava Rao.
17th March, 1944. **S.A. Nos. 208 and 756 of 1943.**

Madras Estates Land Act (I of 1908), section 128—Person suing for specific performance of contract to sell the lands to him—If a "person having an interest in the holding" within the meaning of section 128—Payment by him of rent due thereon—Right to recover from another purchaser of the holding—Contract Act (IX of 1872), sections 69 and 70—Not applicable in the circumstances.

NRC

A contract to sell or mortgage does not create an interest in land. Section 128 of the Madras Estates Land Act requires that a person who wishes to pay the money should have an interest in the holding or part of it, which must mean an interest in the land, for the land is the holding. A person who brings a suit for specific performance of a contract to sell the land to him does not acquire an "interest in the land" even on the date of the decree. The decree merely orders the defendant to perform the contract to which he was a party. The actual conveyance has to be brought about by executing the decree; and until the deed has been drawn up and registered no actual conveyance takes place. The plaintiff in a suit for specific performance of an agreement to sell the holding to him who pays the rent to the landholder or deposits the money in Court for payment to the landholder, cannot be said to be a person having an interest in the holding so as to acquire the right under section 128 of the Madras Estates Land Act. The analogy of Order 21, rule 90 of the Civil Procedure Code is not applicable as that rule does not require that a person should have an interest in the property which is the subject of the sale. That rule gives a right to intervene in proceedings to any person whose *interests* are affected by the sale. The word *"interests"* is not a mere plural of the word *"interest"*.

The payment of the rent by the plaintiff must be deemed to be for himself in order to save from sale land in which he was interested, although in doing so he incidentally benefited the vendor and persons claiming through him. He was not paying for the alienee from the vendor of the property who can be said to be bound by law to pay it. Accordingly sections 69 and 70 of the Contract Act, are not applicable to the case. Apart from section 69 of the Contract Act, there is no general principle of justice, equity and good conscience which can avail the plaintiff.

P. Somasundaram for Appellant.

C. Rama Rao for Respondent.

K.S.

Chandrasekhara Ayyar, J. — Subba Reddi *v.* Venkataramayya.

23rd March, 1944. — **S.A. No. 738 of 1943.**

Hindu Law—Joint family—Managing member—Power to renew time-barred debt—Debt though barred on the date, enforceable by reason of provisions of section 4 of the Limitation Act (IX of 1908)—If empowers manager to renew the debt.

The managing member of a joint Hindu family consisting of himself and his two undivided brothers renewed a promissory note, dated 19th May, 1931, by a fresh promissory note on 12th June, 1934, after the expiry of the three years' period of limitation prescribed by the Limitation Act. In a suit on the renewed promissory note the plaintiff contended that as the Court in which the suit could be filed happened to be closed for summer recess when the three years' period of limitation expired with reference to the earlier promissory note and as he could have filed a suit on the reopening day, a manager of the family had a right to renew the debt by the execution of a fresh promissory note on the reopening day and thus stave off the suit.

Held, that the manager had no power to renew or revive the promissory note which had become barred by limitation in the absence of any express authority to do so by the other coparceners. The provisions of section 4 of the Limitation Act cannot be applied so as to extend such powers of a manager.

I.L.R. 5 Mad. 169 (F.B.); I.L.R. 55 Cal. 1210 and (1937) 1 M.L.J. 262, referred to.

[Leave granted as there is no direct authority on the question.]

Ch. Raghava Rao for Appellant.

V. S. Narasimhachar for Respondent.

K.S.

Chandrasekhara Ayyar, J. — Narasimham *v.* Kunchemma.

27th March, 1944. — **S.A. No. 817 of 1943.**

Specific Relief Act (I of 1877), section 55—Mandatory injunction to restrain encroachment by building steps into a common lane belonging to plaintiff and defendant—Delay, indirect motive, absence of real inconvenience and so forth of plaintiff in asking for—Effect.

Where property is held in common by co-owners, one co-owner has no right to build on the property or alter it in any manner without the consent of the others and if he does so, the other co-owner can seek reliefs in a Court of law by asking for a mandatory injunction or other relief not only in cases where the construction or the alteration amounts to a nuisance or causes inconvenience, but also in cases where it is a mere infringement of their joint rights. But it is not an absolute rule to be followed irrespective and independent of the facts of each case.

Where the plaintiff the co-owner of a common lane asks for a mandatory injunction to restrain the other co-owner constructing steps encroaching on the lane, if there has been delay, indirect motive, absence of real inconvenience and so forth a mandatory injunction cannot be granted.

P. Somasundaram for Appellant.

K. Kameswara Rao for Respondent.

K.S.

Happell, J. Ramaswami Chettiar *v.* Shanmugham Chettiar.
17th March, 1944. **A.A.A.O. No. 121 of 1943.**

Provincial Insolvency Act (*V of* 1920), *section* 4—*Insolvent compromising claims without reference to the Official Receiver—Not entitled to apply except through the Receiver for declaration that all his debts had been discharged.*

An insolvent who compromises the claims against his estate and discharges them behind the back of the Official Receiver is not entitled to apply to the Insolvency Court for a declaration that his debts had been discharged and he cannot ask for an injunction restraining the Official Receiver from recognising certain persons as creditors or making any disbursements to them.

The Receiver represents the estate and it is not open to the insolvent in the circumstances to make applications as if the Receiver did not exist.

B. Sitarama Rao, T. Krishna Rao and *R. Subramaniam* for Appellant.

R. Gopalaswami Aiyangar, R. M. Halasyam, N. Srinivasa Aiyangar and *N. S. Narayanachari* for Respondent.

K.S.

The Chief Justice and Shahab-ud-din, J. Chinnavan Rowther, *In re.*
21st March, 1944. **Crl.R.C. No. 1024 of 1943.**
(Crl.R.P. No. 963 of 1943.)

Defence of India Rules (1939), *rule* 81—*Powers conferred by—Delegation under section* 2 (5) *of the Defence of India Act by Provincial Government to Additional District Magistrates and Sub-Divisional Magistrates on 27th July,* 1942—*Order by a District Magistrate prohibiting export of paddy or rice to places outside the District—Validity.*

The order by the Additional District Magistrate of Madura, dated 18th February, 1943, notifying that "No person shall export any amount of paddy or rice, however small, from any place in Madura District to places outside its limits except under a permit issued by the Collector of Madura or by an officer authorised by him" is *intra vires* his powers under rule 81 of the Defence of India Rules delegated on the 27th July, 1942, by the Provincial Government. The Additional Magistrate was lawfully authorised to prohibit the transport of rice or paddy from that District without a permit and a person contravening that order is liable to be convicted for the offence.

K. S. Jayarama Ayyar and *S. K. Ahmed Meeran* for Petitioner.

The Advocate-General (*Sir A. Krishnaswami Ayyar*) and the Assistant Public Prosecutor (*N. Somasundaram*) on behalf of the Crown.

K.S.

King and Horwill, JJ. Basayya *v.* Hanumantha Reddi.
23rd March, 1944. **A.A.O. No. 473 of 1943.**

Civil Procedure Code (*V of* 1908), *section* 60 (1) (c)—*House in the occupation of agriculturist—Failure to claim exemption from attachment in earlier stages of execution—Effect—Bar of constructive* res judicata—*Applicability—No public policy against alienation of agriculturist's house so as to bar applicability of* res judicata.

If a person in the course of execution proceedings does not raise an objection to the sale of property which, if raised, would prevent the property from being brought to sale, he is debarred by the principle of constructive *res judicata* from raising the same objection either in subsequent proceedings or at a subsequent stage in the same execution proceedings.

Where a house in the occupation of an agriculturist debtor is proceeded against in execution but the agriculturist debtor fails to claim the exemption under section 60 (1) (*c*) of the Civil Procedure Code he cannot raise that objection subsequently. The question whether a particular house is a house in the occupation of an agriculturist is a question of fact. If there is nothing before the Court to show that the house sought to be sold is a house in the occupation of an agriculturist, it cannot be said that the Court acted without jurisdiction in selling that house.

Section 60 (1) (*c*) was enacted to protect agriculturists. The protection can, however, be waived by the agriculturist; and if he can waive his right under section 60, there cannot be any absolute prohibition against the sale of an agriculturist's house, and therefore no bar to the application of the principle of constructive *res judicata.* Moreover, the fact that section 60, Civil Procedure Code, prohibits only the attachment of an agriculturist's house and does not prevent an agriculturist from selling his house privately if he so wishes is an indication that there is no public policy against the alienation of an agriculturist's house.

Kasturi Seshagiri Rao for Appellant.

P. Chandra Reddi and *K. Venkataratnam* for Respondent.

K.S.

N R C

The Chief Justice and Mockett, J. Sachidananda Krishnaghate—Petitioner.
24th March, 1944. **Crl. Mis. Petn. No. 287 of 1944.**

Restriction and Detention Ordinance (Ordinance No. III of 1944), sections 6 and 10—Effect—Order of detention made under rule 26 of the Defence of India Rules—Validation—Orders cannot be called in question in any Court and Court has no power to make an order under section 491 of the Criminal Procedure Code (V of 1898).

Section 6 of the Restriction and Detention Ordinance, 1944, says, that no order made before the commencement of the Ordinance under rule 26 of the Defence of India Rules shall after such commencement be deemed to be invalid or be called in question on the ground merely that the rule purported to confer power in excess of the powers that might at the time the order was made be legally conferred by a rule made under section 2 of the Defence of India Ordinance, 1939, or under section 2 of the Defence of India Act, 1939. The new section retrospectively validates such orders under rule 26 of the Defence of India Rules. Section 10 of the new Ordinance says that no order made under the Ordinance and no order having effect by virtue of section 6 as if it had been made under the Ordinance shall be called in question in any Court, and no Court shall have power to make an order under section 491 of the Code of Criminal Procedure.

J. R. Gundappa Rao for Petitioner.

K.S.

Chandrasekhara Ayyar, J. Doraiswami Aiyar *v.* Ramaratnam Iyer.
29th March, 1944. **S.A. No. 822 of 1943.**

Civil Procedure Code (V of 1908), section 100—Suit for damages for malicious prosecution—Finding that plaintiff has not proved absence of reasonable and probable cause is one of fact and cannot be interfered with in second appeal.

In a suit for damages for malicious prosecution a finding that the plaintiff has not proved absence of reasonable and probable cause is a question of fact and cannot be interfered with in second appeal.

I.L.R. 25 Bom. 332 (P.C.), I.L.R. 24 Mad. 549, 10 L.W. 314 and 53 M.L.J. 375, relied on.

(1938) 2 M.L.J. 296, not followed.

P. V. Subramanyam for Appellant.

R. Ramamurthi and *A. R. Krishnaswami* for Respondent.

K.S.

Horwill, J. Masulipatam Municipality *v.* Narayanamurti.
31st March, 1944. **C.R.P. No. 299 of 1943.**

Civil Procedure Code (V of 1908), Order 29, rule 1-A—Suit against local authority—Right to not less than two months' time to appear and answer—Summons fixing a shorter period and vakil for municipality appearing and asking for time for filing written statement—Grant of such time once or twice—Effect on right to two months' time for answering summons.

In a suit against a municipality the summons was issued on 4—8—1942 and the Court disregarding rule 1-A of Order 29 of the Civil Procedure Code fixed 31—8—1942 for appearance of vakil who had by that time been engaged by the municipality and he appeared on the date fixed by the Court but asked for time for filing the written statement. The Court granted time until 9—9—1942 and again until 16—9—1942. On 16—9—1942, the vakil for the municipality represented that he had not been able to file a written statement and asked for still further time. The suit was adjourned to 23—9—1942 on condition of the municipality paying Rs. 2, costs. On 23—9—1942 the municipality filed a petition to set aside the order as to costs on the ground that the municipality should have been allowed two months from the date of summons to appear and answer the summons. The Court rejected the petition holding that rule 1-A of Order 29 was not applicable after putting in appearance. On revision, *Held*: Order 29, rule 1-A, allows not less than two months to a local authority not merely to appear but to answer. The fact that the vakil appeared in Court and said that he had been authorised to represent the municipality did not deprive the municipality of its right to have two months to answer the plaint. A local body—unlike a private person—has ordinarily no knowledge of the matters in dispute and needs time to make enquiries—sometimes extensive enquiries—before it is in a position to answer a plaint.

K. Venkataramaraju for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

Chandrasekhara Ayyar, J.
29th March, 1944.

Mammad Neyi *v.* Cannanore Municipality.
S.A. No. 945 of 1943.

Madras District Municipalities Act (*V of* 1920), *section* 83, *proviso as amended by Act* (*XXI of* 1939)—*Cancellation of exemption from property tax—Tax leviable for whole half year and not merely after the coming into force of the amending Act—Assessee failing to appeal to council—Finality of assessment—Recourse to Civil Court barred.*

On 29—8—1939, when the Amending Act XXI of 1939, came into force, section 83 must be deemed to have enacted that there was no exemption from property tax so far as certain buildings used for educational purposes were concerned. The Act does not say and does not even purport to say, that the liability was to take effect from a particular date. What was the period for which the tax could be levied must be ascertained from the four corners of the statute itself in the absence of other data and for this purpose resort must be had to the Taxation and Finance Rules. Rule 8 (2), provides that if a particular procedure is followed by the executive authority with reference to the amendment of the assessment books between one general revision and another, the amendment shall be deemed to take effect on the first day of the half year in which it is made. The assessment shall relate to the entire half year and not merely to the period after the amendment. The position must be viewed as if the statute had stated that there would be no exemption from property tax for the half year in question provided of course the provisions laid down in the rules were followed.

If the revision of assessment is not challenged in the manner provided by the statute the owner of the property cannot come before a civil Court.

D. Ramaswami Aiyangar and *M. C. Sridharan* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *K. Subramanyam* for Respt.

K.S.

Chandrasekhara Ayyar, J.
31st March, 1944.

Somasundara Vellala Thevar *v.* Sri Kothandaramaswami Devasthanam.
A.A.O. No. 286 of 1942.

Madras Estates Land Act (*I of* 1908)—*Ryot who had obtained patta through revenue Court—Suit for injunction restraining rival lessee from landholder interfering with his possession—Jurisdiction of civil Court not ousted.*

Where after having got a patta from the landlord as the result of the decree of a Revenue Court and thus obtaining recognition of his right to remain in possession as an occupancy ryot, his possession is interfered with either by the landholder or by some other person claiming as lessee under the landholder, there is nothing in the Madras Estates Land Act which compels the ryot once again to go before the Revenue Court to seek redress. He does not want a patta, as it has already been granted to him; he does not seek to establish any occupancy rights in the property, as (in the present case) this had been determined in his favour both by the Revenue Court and the Civil Court. If the only remedy he wants is an injunction restraining those who attempt to interfere with his possession, be he the landholder or any person who claims under him, the jurisdiction of the Civil Court to try the suit is not ousted.

S. Panchapagesa Sastri and *T. R. Sundaram* for Appellant.

A. V. Viswanatha Sastri and *S. Muthiah Mudaliar* for Respondent.

K.S.

Kuppuswami Ayyar, J.
3rd April, 1944.

..Bhupathi Naicken *v.* The President, Panchayat Board, Sembiam.

Crl. R. C. No. 186 of 1944.
(Crl. R. P. No. 177 of 1944.)

Madras Local Boards Act (*XIV of* 1920), *section* 171 (1)—*Running a private market for three days—Conviction—Three different sentences cannot be awarded—Proper procedure.*

Where a person is prosecuted for running a private market without a license on three days, the fact that the market was run for three different days does not enable the Court to award three different sentences. The accused would be punished once and if he continues again after the first conviction to run the market without a license, the Act provides for an enhanced punishment being awarded for each subsequent breach.

V. T. Rangaswami Aiyangar for *M. C. Sridharan* for Petitioner.

Respondent not represented.

K.S.

N R C

Kuppuswami Ayyar, J. Rajah of Venkatagiri *v.* Koti Redd
4th April, 1944. **A.A.A.O. No. 198 of 194**

Civil Procedure Code (V of 1908), section 47—Execution petition—Order on—"Bo not ready—Dismissed"—Appealability—Order not one of dismissal for default—Order co clusively determines the matters in controversy.

In an execution petition seeking to recover possession of certain properties accordir to the terms of a decree, the judgment-debtor pleaded that the decree-holder was not ei titled to recover possession as per terms of the decree as he had effected certain repai: at a very heavy expense and completed them in time and he also pleaded that the petitic was barred by limitation. When the petition came on for hearing it was dismissed an the order ran: "Both not ready—Dismissed". An appeal by the decree-holder was di: missed on the ground that the appeal did not lie as the order appealed against did not amou to a decree. On second appeal,

Held, (1) The effect of the parties stating that "they were not ready" will be the sar as failure to let in the necessary evidence in respect of which the burden of proof was o the party failing to let in evidence. It cannot be said that there has been either no appearance, non-prosecution or non-payment of process fees. Accordingly the order car not be said to amount to an order of dismissal for default.

(2) The order conclusively determines between the parties to the suit the question in controversy and relates to the execution of the decree. It amounts to an order refusin to grant the prayer of the decree-holder that he should be put in possession of the prc perties as per terms of the decree in execution. The order therefore amounts to a decre and is therefore appealable.

P. V. Rajamannar for Appellant.

K. Umamaheswaram for Respondent.

K.S.

Chandrasekhara Ayyar, J. Manicka Nadar *v.* Atheenakartha of Sengole Matam
5th April, 1944. Perungulam
S.A. No. 836 of 1943

Usufructuary mortgage—Provision that mortgagee was to enjoy the property for elever years from date of the mortgage after the expiry of which the mortgagor was to pay th amount and have the properties redeemed—Mortgagee directed to pay out of the conside ration various sums due by mortgagor to creditors—Failure of mortgagee to pay the amount and mortgagor discharging the debts—Mortgagor, if can claim to redeem before expiry of th term of eleven years.

It was provided in a usufructuary mortgage, that the mortgagee was to be in possessior and enjoy the property for a period of eleven years from the date of the mortgage and tha after the expiry of the period the mortgagor shall pay the amount and have the mortgagec property redeemed. The consideration of Rs. 625 was made up of three items—a sum o Rs. 214-14-11 due to one *M*, a sum of Rs. 310-1-1 due to one *S*, and a sum of Rs. 100 paic in cash. The mortgagee was directed to pay the sums due to *M* and *S*, but he did not pa the amounts, and the mortgagor discharged the debts owing to pressure from the creditors Though it was only one year from the date of the mortgage, the mortgagor brought a sui for redepmtion. The suit was resisted as premature as it was brought before the expiry of the eleven years period fixed in the deed.

Held: The period fixed for redemption in the deed must govern the rights and relations of the parties in the absence of a contract to the contrary. If one of the parties does not fulfil the requirements or obligations imposed on him the other party may have a remedy in damages against him. Failure on the part of the mortgagee to advance the full amount does not entitle the mortgagor to seek possession of the mortgaged property.

N. S. Sundaram for Appellant.

A. Swaminatha Aiyar for Respondent.

K.S.

Wadsworth, J. Srinivasachari *v.* Sait Chunilal Mulchand and Co.
6th April, 1944. **C.R.P. No. 338 of 1943.**

Madras Agriculturists' Relief Act (IV of 1938), section 19—Application under—Desirability of Court determining whether there is a subsisting and enforceable decree and if subsisting whether it has to be scaled down.

In an application under section 19 of the Madras Agriculturists' Relief Act it is desirable that the Court of first instance should determine firstly whether there is a subsisting and enforceable decree, and secondly whether that decree if subsisting has to be scaled down. See *Satyanarayanamurthy* v. *Srinivasa Jagannadha Rao,* (1943) 2 M.L.J. 135. The decision in *Subba Rao* v. *Vemmanna Seshayya,* (1942) 2 M.L.J. 551, proceeds on the wording of the rules under the Act and does not apply to proceedings under section 19.

T. C. A. Bashyam for Petitioner.

T. Ramamurthi for Respondent.

K.S.

Kuppuswami Ayyar, J. David *v.* Rangaraju.
18th April, 1944. **A.A.O. No. 228 of 1943.**
and C.R.P. No. 524 of 1943.

Lease by receiver in mortgage suit—Execution sale of leased property—Term in lease that rent was payable on a day which was beyond the date of auction sale—Person entitled to the rent.

In a lease for one year by the receiver in a mortgage suit one of the terms was that the rent was payable on 31st December, 1941. At the auction sale in execution of the decree a stranger purchased the property on 18th December, 1941. The auction purchaser claimed the right to receive the entire rent as it was payable on a date subsequent to his purchase, but the decree-holder contended that he was entitled to the entire amount due under the lease as rent was payable to the receiver appointed in his suit and that right cannot be said to have passed to the auction-purchaser.

Held: that the rent has to be apportioned between the auction-purchaser and the receiver representing the estate according to the principle contained in section 36 of the Transfer of Property Act.

Rangiah Chetty v. *Vajravelu Mudaliar,* (1917) I.L.R. 41 Mad. 370, held not to have been overruled by *Phirozshaw Bomanjee* v. *Bai Goolbai,* (1923) I. L. R. 47 Bom. 790 (P.C.) and followed.

P. Somasundaram for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Kuppuswami Ayyar, J. Yoganathan *v.* Kandaswami Pillai.
18th April, 1944. **A.A.O. No. 211 of 1943.**

Practice—Suit on behalf of minor by his next friend for accounts in respect of management of minor's properties—Preliminary decree directing filing of accounts—Appointment of commissioner—Non-payment by plaintiff of commissioner's fees and vakil for minor reporting no instructions—Dismissal of suit in toto—Not justifiable.

A suit was filed by the next friend of a minor calling for the accounts of the management of the minor's properties. A preliminary decree was passed directing the defendant to file the accounts. A commissioner was appointed and time was granted for payment of the fees due to the commissioner. It was not paid in time with the result that the vakil reported no instructions. The plaintiff was absent and the suit was dismissed in *toto* with costs. A petition was filed for setting aside the dismissal order and that petition was also dismissed. On appeal against that order,

Held: The trial Judge was not justified in dismissing the suit in *toto* after the preliminary decree was passed. He could have called upon the defendant to pay the commission fees and made the necessary orders for enabling the defendant to recoup it from the estate of the minor plaintiff.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Appellant.

Respondent not represented.

K.S.

N.R.C.

Kuppuswami Ayyar, J. Pullamma *v.* Thatalingam.
20th April, 1944. Cr.R.C. No. 165 of 1944.
(Cr. R. P. No. 156 of 1944.

Criminal Procedure Code (V of 1898), *section* 488—*Wife living away from husband not because of any physical ill-treatment—Husband marrying a second wife after some years—Not "cruelty"—Claim of first wife to maintenance under section* 488 *of Criminal Procedure Code—Offer to take her back—Effect.*

A husband was living with his parents and there was not much of cordiality between his parents and his wife with the result that the latter left the house. After waiting for some years the husband married a second wife. The husband offered to take back the first wife, who however refused to go and live with him. Hence her petition for maintenance under section 488, was dismissed on the ground that there was no cruelty and no neglect on the part of the husband. On revision it was urged that the offer of the husband to take back the wife could not be accepted as a *bona fide* one.

Held: As there was nothing in the present case to indicate that the wife received any physical illtreatment at the hands of her husband and it was only incompatibility of temperament which prevented the wife from living amicably with her husband's parents that resulted in her leaving her husband's house she will not be entitled to claim any maintenance.

So long as the husband is not guilty of any cruelty or of neglect, she is bound to go, and live with him. The mere fact that the husband has taken a second wife and that too after waiting for several years and after the first wife refused to join him cannot be said to amount to cruelty.

Sundarammal v. *Palaniandi Mudali,* (1940) 1 M.L.J. 171, distinguished.

T. V. Ramanatha Iyer and *V. Viyanna,* for Petitioner.

Respondent *ex parte.*

K.S.